Supreme Court, U.S.
FILED
07-501 OCT 11 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

MARILYN SHIRLEY AND RAYMOND DOUGLAS SHIRLEY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

PETER GOLDBERGER
50 RITTENHOUSE PLACE
ARDMORE, PA 19003
(610) 649-8200

ARCHIBALD COWAN MCCOLL
MCCOLL & MCCOLLOCH
1601 ELM STREET
DALLAS, TX 75201
(214) 979-0999

PAMELA HARRIS*
(Counsel of Record)
HARVARD LAW SCHOOL
SUPREME COURT AND
APPELLATE PRACTICE
CLINIC

WALTER DELLINGER
KATHRYN E. KOMP**
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300
**May be contacted at O'Melveny & Myers LLP*
***Admitted only in Wisconsin; supervised by principals at the firm*

Attorneys for Petitioners

QUESTION PRESENTED

In 1974, Congress amended the Federal Tort Claims Act, 28 U.S.C. § 2860(h) ("FTCA"), to provide expressly that the United States could be held liable for the intentional torts of its law enforcement officers. The question presented by this case is whether the FTCA is properly construed to incorporate state rules of respondeat superior that would effectively foreclose the liability mandated by Congress.

PARTIES TO THE PROCEEDING

Petitioners are the plaintiffs-appellants below. Defendant-appellee below, the United States, is respondent under this Court's Rule 12.6.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

A. Statutory Background 4

B. Factual Background 6

C. Proceedings Below 9

REASONS FOR GRANTING THE PETITION 12

I. The Court Should Grant the Petition To Eliminate Confusion Over the Proper Relationship Between State Law and the Waiver of Sovereign Immunity in the FTCA 13

II. The Court Should Grant the Petition To Resolve a Growing Divide Over the Correct Understanding of the Scope of Employment of Law Enforcement Officials 22

CONCLUSION 28

APPENDIX A:
Opinion,
United States Court of Appeals for
the Fifth Circuit, May 17, 2007 ..... 1a

TABLE OF CONTENTS
(continued)

Page

APPENDIX B:
Order on Petition for Rehearing and Rehearing En Banc,
United States Court of Appeals for the Fifth Circuit, July 16, 2007 ..... 6a

APPENDIX C:
Order Granting Motion for Summary Judgment and Denying Motion for Partial Summary Judgment,
U.S. District Court for the Northern District of Texas, March 21, 2006 ..... 8a

APPENDIX D:
Final Judgment,
U.S. District Court for the Northern District of Texas, March 21, 2006 ..... 16a

APPENDIX E:
Order Denying Motion for Reconsideration,
U.S. District Court for the Northern District of Texas, May 9, 2006 ..... 18a

APPENDIX F:
Provisions of the Federal Tort Claims Act,
codified at 28 U.S.C. §§ 1346 *et seq.* 20a

TABLE OF AUTHORITIES
(continued)

Page

CASES

Baker v. Texas & P. Ry. Co.,
359 U.S. 227 (1959) 26

Barnhart v. Thomas, 540 U.S. 20
(2003) 14

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,
403 U.S. 388 (1971) 9, 26

Burks v. Lasker,
441 U.S. 471 (1979) 19

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 26

Carlson v. Green,
446 U.S. 14 (1980) 6, 25

Chapa v. DOJ,
339 F.3d 388(5th Cir. 2003) 6

City of Sharonville v. American Employers Ins.,
846 N.E.2d 833 (Ohio 2006) 24

Doe v. City of Chicago,
360 F.3d 667 (7th Cir. 2004) 21, 22, 23, 24

Doe v. Forrest,
853 A.2d 48, 61 (Vt. 2004) 23

Doe v. White,
No. 00 C 0928, 2003 WL 256889
(N.D. Ill. 2003) 24

Dolan v. U.S. Postal Service,
546 U.S. 481 (2006) 14

Feres v. United States,
340 U.S. 135, 139 (1950) 20

TABLE OF AUTHORITIES
(continued)

Page

Field v. United States,
107 F. Supp. 401 (N.D. Ill. 1952) 15

Frazier v. Badger,
603 S.E.2d 587 (S.C. 2004) 24

Garcia v. United States,
799 F. Supp. 674 (W.D. Tex. 1992) 13, 14, 15

Indian Towing Co. v. United States,
350 U.S. 61 (1955) 4, 12, 16, 18

Latullas v. State, 658 So. 2d 800
(La. Ct. App. 1995) 23

Lopez v. Gonzales,
127 S. Ct. 625 (2006) 19

Mackey v. U.P. Enters., Inc.,
935 S.W.2d 446 (Tex. App. 1996) 11, 21

Mary M. v. City of Los Angeles,
814 P.2d 1341 (Cal. 1991) 23

Medrano v. City of Pearsall,
989 S.W.2d 141 (Tex. App. 1999) 21

Molzof v. United States,
502 U.S. 301 (1992) 25

NLRB v. Hearst Publications,
322 U.S. 111 (1944) 25

Norris ex rel. West v. Waymire,
114 F.3d 646 (7th Cir. 1997) 23

Parker v. Midwest City,
850 P.2d 1065 (Okla. 1993) 17

Primeaux v. United States,
191 F.3d 874 (8th Cir. 1999) 16, 19

Red Elk ex rel. Red Elk v. United States,
62 F.3d 1102 (8th Cir. 1995) 23

TABLE OF AUTHORITIES
(continued)

Page

Shantelle S. v. State,
No. 110268, 2006 WL 1141199 (N.Y. Ct. Cl. 2006) 24

United States v. Campbell,
172 F.2d 500 (5th Cir. 1949) 15

United States v. Gaubert,
499 U.S. 315 (1991) 10

United States v. Miller,
132 Fed. Appx. 10 (5th Cir. 2005) 9

United States v. Muniz,
374 U.S. 150 (1963) 12, 16, 18

United States v. Olson,
546 U.S. 43 (2005) 16, 21

United States v. Sharpe,
189 F.2d 239 (4th Cir. 1951) 15

United States v. White Mountain Apache Tribe,
537 U.S. 465 (2003) 18

Williams v. United States,
350 U.S. 857 (1955) 15, 16, 17

STATUTES

18 U.S.C. § 2241(a)(1) 9

18 U.S.C. § 2243 3

18 U.S.C. § 2243(b) 9

18 U.S.C. § 2243(b)(2) 3

18 U.S.C. § 2244(a)(1) 9

18 U.S.C. § 2244(a)(4) 9

18 U.S.C. § 3050 6

TABLE OF AUTHORITIES
(continued)

Page

18 U.S.C. § 3624(b) 8
18 U.S.C. § 4042 10
21 U.S.C. § 843(b) 7
28 U.S.C. § 1346(b) ..... *passim*
28 U.S.C. § 2680(a) 5, 10
28 U.S.C. § 2674 25
28 U.S.C. § 2675(a) 14
28 U.S.C. § 2675(b)(1) 14
28 U.S.C. § 2680(h) ..... *passim*
Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (1974) 6
Prison Rape Elimination Act of 2003, Pub. L. 108-79, 117 Stat. 974 (2003) 7
Restatement (Second) of Agency § 228(1)(c) (1958) 18
Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) 21

REGULATION

28 C.F.R. § 541.13 8

OTHER AUTHORITIES

Allen J. Beck, et al., *Bureau of Justice Statistics Special Report: Sexual Violence Reported by Correctional Authorities, 2006* (Aug. 2007) 6

TABLE OF AUTHORITIES
(continued)

Page

Dianne Rosky, *Respondeat Inferior: Determining the United States' Liability for the Intentional Torts of Federal Law Enforcement Officials*, 36 U.C. Davis L. Rev. 895, 933-935 (2003) 14, 20, 21, 26

General Accounting Office, Report to the Hon. Eleanor Holmes Norton, House of Representatives, *Women in Prison: Sexual Misconduct by Correctional Staff* (June 1999) 6, 7

Jack Boger, et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. Rev. 497 (1976) 18, 26

Office of the Inspector General, *Deterring Staff Sexual Abuse of Federal Inmates* (Apr. 2005) 6

Rochelle Rubin Weber, *Note, "Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 Minn. L. Rev. 1513 (1992) 22

S. Rep. No. 93-588 (1974) 5, 16

William Lloyd Prosser, et al., *Prosser & Keeton on Torts* (5th ed. 1984) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioners Marilyn Shirley and Raymond Douglas Shirley respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is unreported but is available at 2007 WL 1454739 and is reprinted in the Appendix to the Petition ("App.") at 1a-5a. The order of the district court is unreported but is available at 2006 WL 708651 and is reprinted at App. 8a-15a.

JURISDICTION

The court of appeals entered its judgment on May 17, 2007. App. 1a-5a. A petition for rehearing was denied on July 16, 2007. *Id.* at 18a-19a. This petition is timely filed within 90 days thereafter. 28 U.S.C. § 2101(c). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 28 of the United States Code provides in relevant part:

§ 1346. United States as defendant

> **(b)(1)** Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing

on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

. . . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches,

to seize evidence, or to make arrests for violations of Federal law.

28 U.S.C. §§ 1346(b)(1), 2680(h).

STATEMENT OF THE CASE

This case arises from the rape of petitioner Marilyn Shirley, then an inmate at the Federal Medical Center for Women in Carswell, Texas, by a United States Correctional Officer, Michael Miller. There is no dispute that on March 11, 2000, Officer Miller, the sole officer on duty to monitor female inmates in the "Camp" where Shirley was housed, awakened Shirley and ordered her to report to the Officers' Station, where he sexually assaulted her and then warned her against reporting the rape.

Three months after Miller was indicted for the sexual abuse of a ward in violation of 18 U.S.C. § 2243, petitioners brought suit against the United States under a provision of the Federal Tort Claims Act ("FTCA") that waives the government's sovereign immunity from suit for "any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" with "regard to acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. § 2680(h). Despite this waiver of immunity, the district court dismissed petitioner's suit on the ground that the officer who had raped her while she was "under [his] custodial, supervisory, [and] disciplinary authority," 18 U.S.C. § 2243(b)(2), was nevertheless not acting within the "scope of his employment," as required by the FTCA, under the common law of the State of Texas. App. 15a. The court of appeals affirmed this result, again incorpo-

rating Texas state law into the FTCA, and reasoning that the officer's act was not closely related to, and did not grow out of, a legitimate employment duty or goal, as it believed state law to require. *Id.* at 1a-5a.

A. Statutory Background

1. The Federal Tort Claims Act ("FTCA" or "the Act") was enacted in 1946 to waive the federal government's sovereign immunity from suit for employees' torts under specified circumstances. 28 U.S.C. § 1346(b)(1); *see Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955). The FTCA creates exclusive federal jurisdiction over claims against the United States:

> for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). The statute thus requires a plaintiff who seeks to recover from the government to demonstrate (1) that his alleged tortfeasor was a federal employee, (2) that the employee acted in the scope of his employment, and (3) that the actions giving rise to the claim constituted a tort under local law.

Congress also provided certain exceptions to this broad waiver of immunity. Specifically, and as relevant here, Congress immunized the government from suit for claims "based upon the exercise or per-

formance [of] . . . a discretionary function or duty." 28 U.S.C. § 2680(a). In its original form, the FTCA also excepted most intentional torts from its waiver of immunity. 28 U.S.C. § 2680(h) (excluding claims arising out of "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights").

2. In 1974, prompted by a notorious episode in which federal agents in Collinsville, Illinois, conducted a series of "abusive, illegal, and unconstitutional 'no-knock' raids," S. Rep. No. 93-588, at 2 (1974), Congress reconsidered the intentional tort exception in 28 U.S.C. § 2680(h). To provide a remedy for such illegal or unauthorized conduct on the part of federal law enforcement officers, Congress tailored an amendment to the FTCA to ensure that the federal government would be made "liable for the tortious acts of its law enforcement officers," even "when they act in bad faith or without legal justification," so long as the acts are taken within the scope of employment or "under color of Federal law." S. Rep. No. 93-588, at 4 (1974). Congress accordingly provided

> That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.

Act of Mar. 16, 1974, Pub. L. No. 93-253, § 2, 88 Stat. 50 (codified as amended at 28 U.S.C. § 2680(h) (1974)) ("the 1974 amendment").[1] Because Congress made the intentional torts of law enforcement officers actionable through § 1346(b), the general place and scope of employment restrictions of that provision apply to intentional tort claims, as well.

B. Factual Background

1. The sexual abuse of inmates by prison guards and staff is a serious and all too frequent problem in the federal prison system. In 2006 alone, 242 federal inmates alleged that they had been the victims of sexual violence while incarcerated. *See* Allen J. Beck, et al., *Bureau of Justice Statistics Special Report: Sexual Violence Reported by Correctional Authorities, 2006* at 3, table 1 (Aug. 2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf. Between fiscal years 2000 and 2004, the Department of Justice's Office of the Inspector General opened 351 investigations of staff members alleged to have sexually abused inmates. Office of the Inspector General, *Deterring Staff Sexual Abuse of Federal Inmates* 6 (Apr. 2005). And "[m]any correctional experts believe that staff-on-inmate sexual misconduct is likely underreported . . . due to the fear of retaliation and vulnerability felt by female inmates." Gen-

---

[1] The amendment defines a "law enforcement officer[]" as a federal official "who is authorized by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." A correctional officer in the Bureau of Prisons falls squarely within that definition. *See* 18 U.S.C. § 3050 (powers of Bureau officers); *Chapa v. DOJ*, 339 F.3d 388, 390 (5th Cir. 2003) ("[A]s defined in § 2680(h), a BOP official is a federal law enforcement officer.") (citing *Carlson v. Green*, 446 U.S. 14, 17 (1980)).

eral Accounting Office, Report to the Hon. Eleanor Holmes Norton, House of Representatives, *Women in Prison: Sexual Misconduct by Correctional Staff* 7 (June 1999). It is the national policy of this country to eliminate the sexual abuse of prisoners. *See* Prison Rape Elimination Act of 2003, Pub. L. 108-79, 117 Stat. 974 (2003) (establishing "zero-tolerance standard" for sexual abuse of prisoners).

2. On January 12, 1998, petitioner Marilyn Shirley ("petitioner" or "Shirley") entered the Federal Medical Center at Carswell, Texas, to begin serving a 37-month sentence for the unlawful use of a communication device to facilitate the distribution of a controlled substance, in violation of 21 U.S.C. § 843(b). App. 8a-9a. A first-time offender who had cooperated with the government and had been placed in the Witness Protection Program, Shirley was assigned to the "Camp," a minimum-security residential unit located outside the secure perimeter of the medical facility. The Camp houses approximately 240 female inmates and has a relatively low staff-to-inmate ratio. *See* R. 231.[2]

One of the guards assigned to the Camp was Correctional Officer Michael Lawrence Miller. R. 289. On March 11, 2000, Officer Miller was the only officer assigned to monitor the inmates in the Camp during the early morning shift. Shortly after 3:00 that morning, Officer Miller awakened petitioner, ordered her out of her cell, and directed her to report to the Officer's Station. *Id.* at 260. Had she disobeyed the order, Shirley would have been subject to

---

[2] Citations are to the appellant's record, filed with the court of appeals, and take the form R. [page].

official discipline, *see* 28 C.F.R. § 541.13 (Code 307), including the loss of "good conduct time," which would have delayed her release from imprisonment, *see* 18 U.S.C. § 3624(b).

When petitioner arrived at the Station, Officer Miller locked the door, ordered her to sit down, and used his radio to arrange for a guard at the main prison facility to signal if any other officer approached the Station. R. 260, 289. Officer Miller then began to kiss petitioner and pulled her into an adjacent supply room. As she wrestled to get away from him, Officer Miller raped petitioner Shirley. *Id.* at 260. While he was raping her, Officer Miller repeatedly told Shirley that, if she ever reported the assault, no one would believe her word over his. *Id.* Eventually, Officer Miller heard someone on the radio clear his throat, and he completed his sexual assault by ejaculating on Shirley and on her clothing. *Id.*

Upon returning to her cell, Shirley placed the clothes she was wearing in plastic wrap and hid them under her locker. R. 227, 259, 289. She provided that evidence to Camp officials when she reported the rape to a Correctional Officer and the Camp Administrator on September 8, 2000, immediately before she was released from the facility. *Id.* at 233, 259, 289.[3]

---

[3] Had Shirley reported the rape as an inmate, she would have risked a transfer to "protective custody" or "administrative custody for investigation," either of which would have involved maximum-security, solitary living conditions. *See* R. 314-315.

3. On August 13, 2003, a grand jury indicted Officer Miller for, *inter alia*, aggravated sexual abuse, in violation of 18 U.S.C. § 2241(a)(1); two counts of abusive sexual contact, in violation of 18 U.S.C. § 2244(a)(1), (4); and sexual abuse of a ward, in violation of 18 U.S.C. § 2243(b). R. 238. A jury found Officer Miller guilty on all counts, and on July 2, 2004, he was sentenced to 150 months of imprisonment. *Id.* at 234, 258-59. *See United States v. Miller*, 132 Fed. Appx. 10 (5th Cir. 2005), *cert. denied*, 546 U.S. 939 (Oct. 11, 2005).[4]

C. Proceedings Below

1. On November 26, 2003, after exhausting their administrative remedies, petitioners filed a complaint against the United States pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1). Petitioners raised two distinct claims. First, they argued that the government was directly liable for its negligence in hiring, training, supervising, and retaining Officer Miller. Second, petitioners argued that the United States was vicariously liable for Officer Miller's intentional infliction of emotional distress, battery, assault, false imprisonment, negligence per se, and negligence. App. 10a. Petitioners moved for summary judgment on their claims of vicarious liability, and the government moved for

---

[4] Petitioners subsequently filed a *Bivens* action against Officer Miller in the United States District Court for the Northern District of Texas. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Although the jury returned a verdict in favor of petitioners in the amount of $4 million, Officer Miller, who is serving his 150-month sentence, has no attachable assets and is virtually judgment-proof. Pet. C.A. Br. 3 n.1.

summary judgment on all of petitioners' claims. *Id.* On March 21, 2006, the district court granted summary judgment for the government. *Id.*

a. The district court rejected petitioners' argument that the government was directly liable for negligence in hiring and training Officer Miller, explaining that "employment decisions, [such as] the manner in which the United States selects, trains, and supervises its employees, are discretionary functions." App. 13a; *see* 28 U.S.C. § 2680(a); *United States v. Gaubert*, 499 U.S. 315 (1991). The court recognized that "regulations and statutes . . . provide that the Bureau of Prisons has a duty to provide a safe environment and protect its inmates," *see* 18 U.S.C. § 4042, but reasoned that those "statutes and regulations d[id] not limit . . . the existence of discretion for implementing that specific policy." App. 13a-14a. The court therefore concluded that petitioners' claims of negligence in hiring and training fell within the discretionary function exception of 28 U.S.C. § 2680(a). *Id.*

b. Next, the district court held that the government was not vicariously liable for Officer Miller's assault because the assault was not within the scope of his employment. The district court looked to Texas state law to determine scope of employment, as it believed it was required to do under 28 U.S.C. § 1346(b)(1). App. 14a. Unable to cite any cases from Texas that involved comparable circumstances of rape or assault by a law enforcement officer, the district court relied upon a decision that considered sexual harassment, in the context of a worker's compensation statute, to determine the scope of Officer Miller's employment at the federal penitentiary. *See*

id. (citing *Mackey v. U.P. Enters., Inc.*, 935 S.W.2d 446, 453 (Tex. App. 1996)). Ultimately, the court concluded that an employee acts within the scope of employment under Texas law, and thus under the FTCA, only if "his actions are (1) within the general authority given him, (2) in furtherance of the employer's business, and (3) for the accomplishment of the object for which he was employed." *Id.* (citing state cases). Because the court believed that Miller had "stepped aside from his employment to accomplish his own, rather than [his employers'] purpose" when he assaulted Shirley, the court concluded that he had not acted within the scope of employment and that the United States was not vicariously liable for his acts. *Id.*

2. The court of appeals affirmed. Critically, like the district court, the court of appeals construed the FTCA's "scope of employment" requirement to incorporate state-law principles of respondeat superior. The court of appeals went on to reject petitioners' argument that, although the district court had correctly stated the general test for scope of employment in Texas, it had erred in applying that law in the very different context of assault in a penal institution. *See* App. 4a. Although petitioners cited several cases in which employers had been found liable for employees' intentional torts, the court of appeals held that petitioners' claim could not succeed because they had failed to "show[] that [Miller's] wrongful act grew out of a legitimate employment duty or goal" or that the assault was "closely related" to such a duty or goal, as the court of appeals believed Texas law to require. *Id.*

3. Petitioners filed a petition for rehearing and rehearing en banc. Petitioners emphasized that their claims fell within the law enforcement exception to the intentional tort bar of 28 U.S.C. § 2680(h). They noted that incorporation of state law as articulated by the district court and court of appeals would negate the exception in § 2680(h), because the listed torts would never fall within an officer's "scope of employment," as narrowly defined below. The court of appeals denied the petition on July 16, 2007.

REASONS FOR GRANTING THE PETITION

The court of appeals in this case purported to apply Texas state law to determine whether the federal government could be held liable for the intentional tort of a federal corrections officer who assaulted an inmate while on duty. That approach is incorrect; it effectively reads out of the FTCA Congress' waiver of immunity for the intentional torts of law enforcement officers, and it conflicts with the decisions of this Court in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), and *United States v. Muniz*, 374 U.S. 150 (1963). The court of appeals' decision also (1) exacerbates the confusion among federal courts over the proper relationship between federal and state law under the FTCA, and (2) aggravates the growing divide among numerous federal and state courts regarding the scope of employment of law enforcement officers. Contrary to the plain text and congressional intent behind the FTCA, the decision below prevents federal inmates, who, unlike other plaintiffs, are subject to the government's complete control, from recovering from the government when its employees use that control intentionally to engage in harmful acts. Petitioners therefore respect-

fully request that this Court grant the petition for a writ of certiorari and reverse the decision of the court of appeals.

I. The Court Should Grant the Petition To Eliminate Confusion Over the Proper Relationship Between State Law and the Waiver of Sovereign Immunity in the FTCA.

A. Since the FTCA was enacted, federal courts have split over, and been confused by, the proper relationship between state law and the federal waiver of immunity in 28 U.S.C. § 1346(b)(1). Although the statute clearly ties federal liability to the "law of the place" where a tort occurred, there is persistent uncertainty as to whether the "law of the place" governs not only the types of torts for which a plaintiff can recover but also whether a certain act was within a tortfeasor's "scope of employment."

1. The FTCA waives immunity with respect to the wrongful acts of

> any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where [the act] occurred.

28 U.S.C. § 1346(b)(1). Application of the usual canons of construction strongly suggests that "law of the place" should be read as pertaining only to the "circumstances where . . . a private person[] would be liable"—in other words, to govern the type of torts for which a plaintiff may sue, but not the determination of "scope of employment." *See Garcia v. United States*, 799 F. Supp. 674, 676-681 (W.D. Tex. 1992),

rev'd in relevant part, 62 F.3d 126 (5th Cir. 1995) (en banc) (per curiam); Dianne Rosky, *Respondeat Inferior: Determining the United States' Liability for the Intentional Torts of Federal Law Enforcement Officials*, 36 U.C. Davis L. Rev. 895, 933-935 (2003).[5] That reading of the intentional tort exclusion in § 2680(h) is also consistent with this Court's practice of construing exceptions to the FTCA narrowly, against the government. *See Dolan v. U.S. Postal Service*, 546 U.S. 481, 491-492 (2006).

Unsurprisingly, therefore, in the years after the FTCA was adopted, several federal courts held that § 1346(b)(1) required application of "federal law and decisions to determine whether . . . the person who inflicted the injury was an 'employee of the Government acting within the scope of his office or employ-

---

[5] Under the "'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows," *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), the phrase "law of the place" modifies the phrase "under circumstances where the United States, if a private person, would be liable." Reading the determination of "scope of employment" as implicitly included in the "circumstances where . . . a private person[] would be liable" renders superfluous the specific reference to scope in the Act. *See Garcia v. United States*, 799 F. Supp. 674, 678 (W.D. Tex. 1992) ("By expressly including the scope of employment language in this provision, Congress has indicated that this element should be determined separately and distinctly from the law of the place."), *rev'd in relevant part*, 62 F.3d 126 (5th Cir. 1995) (en banc) (per curiam). Other provisions of the FTCA, which refer to an employee "acting within the scope of his office or employment" without referring to the "law of the place" under which this might be determined, confirm that "scope of employment" is a federal question, not one to be addressed under state law. *See id.* at 679 (citing 28 U.S.C. §§ 2675(a), 2679(b)(1)).

ment,'" and "local law for the purpose of determining whether the act with which he is charged gives rise to liability." *United States v. Sharpe*, 189 F.2d 239, 241 (4th Cir. 1951); *accord Field v. United States*, 107 F. Supp. 401, 404 (N.D. Ill. 1952). The Fifth Circuit, however, split from this consensus in *United States v. Campbell*, 172 F.2d 500, 503 (5th Cir. 1949), where it held that state law governed the scope of military employment.

This Court weighed in on the issue in *Williams v. United States*, 350 U.S. 857 (1955) (per curiam), where it reversed a Ninth Circuit decision that had held that scope of employment in the military context is a question of federal law. In its entirety, this Court's opinion stated:

> This case is controlled by the California doctrine of respondeat superior. The judgment is vacated and the case is remanded for consideration in the light of that governing principle.

Williams, 350 U.S. at 857. That ruling was rendered against the position of the Solicitor General that a uniform federal standard was both necessary and consistent with the statute. Br. for the United States, No. 24, Oct. Term 1955, at 35-36.

Although the federal courts generally, but not uniformly, *see Garcia*, 799 F. Supp. at 676-677 & n.7, understood *Williams* to resolve the conflict between the Fifth and the Fourth and Ninth Circuits, the lack of reasoning in the decision has left the courts confused over the proper relationship between state and federal law in the FTCA. For example, courts have remained unsure to what extent a state's tort law and immunities may limit a plaintiff's ability to

recover under the federal statute. *See, e.g.*, *United States v. Olson*, 546 U.S. 43, 44-45 (2005) (abrogating cases holding that the federal government could be liable under the FTCA where local law would make a state or municipal entity liable); *United States v. Muniz*, 374 U.S. 150, 164 (1963) (rejecting argument that state rules of immunity applied to shield government from liability); *see also Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (rejecting application of the "'non-governmental'—'governmental' quagmire . . . plagu[ing]" state law).

2. That confusion has only intensified since Congress adopted the 1974 amendment to the FTCA, which raises serious questions as to the proper application of state and federal law under 28 U.S.C. § 2680(h). There is no dispute that Congress, in adopting the 1974 amendment, intended to waive the government's immunity for those torts committed by law enforcement officers not only within the scope of employment but also "under color of Federal law," regardless of whether they were committed "in bad faith or without legal justification." S. Rep. No. 93-588, at 3, 4 (1974); *see United States v. Muniz*, 374 U.S. 150 (1963) (explaining that to determine whether federal prisoners were "entitled to maintain the[ir] suits require[s] [the Court] to determine what Congress intended when it passed the [FTCA] in 1946"). The courts of appeals, however, have struggled to effectuate that intent. *See Primeaux v. United States*, 191 F.3d 874, 882 (8th Cir. 1999) (en banc) (Lay, J., dissenting). The decision below negates that intent completely. This case thus provides the Court with an opportunity to revisit *Williams* and clarify the proper relationship between

state and federal law under 28 U.S.C. § 1346(b)(1) and 28 U.S.C. § 2680(h).[6]

a. As the court of appeals' decision in this case demonstrates, the application of state law to determine the scope of employment of law enforcement officers under 28 U.S.C. § 2680(h) may exclude from coverage the very transgressions for which Congress intended to waive immunity. Indeed, torts committed "in bad faith or without legal justification"—the precise object of the 1974 amendment—are the most likely, by definition, to fall *outside* of state doctrines of respondeat superior. *See Parker v. Midwest City*, 850 P.2d 1065, 1068 (Okla. 1993) ("If Officer Strong's actions were in bad faith he was acting outside his scope of employment, and thus the City is not liable."); *compare* William Lloyd Prosser, et al., *Prosser & Keeton on Torts* 882-83 (5th ed. 1984) (explaining that plaintiff suing for malicious prosecution, *see* 28 U.S.C. § 2680(h), must establish "malice," which is present where employee's purpose is "something other than the social one of bringing an offender to justice," which is the only proper justifi-

---

[6] *Williams* was an ordinary negligence case arising under 28 U.S.C. § 1346(b)(1), and did not implicate § 2680(h)'s subsequent and express assumption of liability for the intentional torts of law enforcement officers. Accordingly, this Court need not overrule *Williams* in order to adopt petitioners' view that, at a minimum, state common law should not be understood to define the "scope of employment" of law enforcement officers charged with intentional torts. To the extent that this Court believes *Williams* has any bearing on the interpretation of § 2680(h), however, this case presents an ideal opportunity to revisit that decision, particularly in light of more recent Court precedent reading federal employment statutes to implement uniform national standards of respondeat superior. *See infra* page 26 n.8.

cation for a criminal proceeding); *with* Restatement (Second) of Agency § 228(1)(c) (1958) (providing that action is not within scope of employment if it is not motivated by purpose to serve the master).

Thus, construing "scope of employment" under the FTCA to incorporate state-law respondeat superior doctrines often will have the effect—as it did here—of reading the 1974 amendment right out of the Act. This Court has repeatedly cautioned against any form of statutory interpretation that leads to such a result, regardless of the statute at issue. *See, e.g., United States v. White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003) (explaining that "the more fundamental objection to the Government's position is that, if carried to its conclusion, it would read the trust relation out of Indian Tucker Act analysis; if a specific provision for damages is needed, a trust obligation and trust law are not"). And it has been particularly cautious with respect to the FTCA, emphasizing that the Act is not "self-defeating by covertly embedding the casuistries of [local] liability for torts." *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955). Congress "having decided that discipline in the federal prisons will not be so seriously impaired that all recovery should be denied for [intentionally] inflicted injuries," the court of appeals in this case erred under this Court's precedent by concluding that the legislature did, "at the same time[,] make recovery depend upon a State's decision to the contrary." *United States v. Muniz*, 374 U.S. 150, 165 (1963); *see also* Jack Boger, et al., *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretive Analysis*, 54 N.C. L. Rev. 497, 522-23 (1976) ("[S]ince the

amendment by its terms applies to federal 'officers,' . . . the question of scope of employment in litigation under the [1974] amendment should be answered independently of prior interpretations under the general provisions of the FTCA.").

Indeed, this Court has repeatedly held that, even where a federal statute clearly incorporates state law for the rule of decision, the state law applies only to the extent that it is consistent with the federal policy underlying the cause of action and does not cause "the prohibition of [the] federal statute . . . [to] be set at naught." *Burks v. Lasker*, 441 U.S. 471, 479 n.6 (1979) (internal quotation marks omitted); *cf. Lopez v. Gonzales*, 127 S. Ct. 625, 632 (2006) (refusing, under immigration statute that defined "aggravated felony" to include "any felony punishable under the Controlled Substances Act [CSA]," including "offense[s] . . . in violation of Federal or State law," to include as aggravated felony a state drug felony punishable under the CSA because, *inter alia*, Congress had already "pegged the immigration statutes to the classifications Congress itself chose"). In this case, of course, it is far from clear that state law is intended to play any role at all in determination of "scope of employment" under the FTCA. *See supra* pages 5-6, 113-15 & n.5. It is thus particularly unjustifiable to deploy state law in a way that so radically undermines the purpose of the 1974 amendment.

b. The court of appeals' decision in this case exacerbates the existing confusion over the proper interplay between 28 U.S.C. §§ 1346(b)(1) and 2680(h). In *Primeaux v. United States*, 191 F.3d 874 (8th Cir. 1999) (en banc), the Eighth Circuit divided six-five

over the question whether a tribal police officer was acting within the scope of his employment when he approached a stranded motorist in his police car with his red lights flashing, drove her to an isolated spot, ordered her out of the car, and raped her, all while he was on a government-paid trip to the state of New Mexico. *See id.* at 882 (Lay, J., dissenting). The majority, applying state law, concluded he was not. *Id.* at 881 (majority opinion). The dissent objected that the court's "strict, literal interpretation of scope of employment" excluded from the waiver of immunity "th[o]se acts" for which "Congress intended . . . liability" in adopting the 1974 amendment. *Id.* at 885 (Lay, J., dissenting).

3. The confusion over the role of state law is particularly intolerable given that there is no "workable, consistent and equitable" body of state law to apply to determine the "scope of employment" of law enforcement officers. *Feres v. United States*, 340 U.S. 135, 139 (1950) (explaining that the FTCA should be construed "to make a workable, consistent and equitable whole" because "[t]he [Act] was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit"). Several states have excluded the intentional torts of law enforcement officers from their waivers of sovereign immunity. As a result, the courts of those states have not developed law on the subject to which federal courts may turn in interpreting the FTCA. *See* Rosky, 36 U.C. Davis L. Rev. at 901-902 & n.17 (citing Georgia, Massachusetts, and Texas statutes).

Indeed, Texas itself excludes from its waiver of immunity all claims "arising out of assault, battery, false imprisonment, or any other intentional torts." Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2); *see Medrano v. City of Pearsall*, 989 S.W.2d 141, 144 (Tex. App. 1999) (dismissing suit against city brought by plaintiff who was assaulted by police officer because statutory "waiver of immunity does not extend to . . . intentional torts"). As a result, there is no Texas common-law rule as to when an intentional tort by a government official may fall within the "scope of employment" of that official. The district court below was left to divine for itself what state courts might determine to be within the scope of employment of a correctional officer—a man who is "armed, has authority to arrest[,] . . . has access to all sorts of personal information, is an authority figure trained to develop and project an intimidating aura, and may seem to be above the law," *Doe v. City of Chicago*, 360 F.3d 667, 671 (7th Cir. 2004) (Posner, J.)—by considering a radically different case involving sexual harassment and a worker's compensation statute. *See* App. 14a (citing *Mackey v. U.P. Enters., Inc.*, 935 S.W.2d 446, 453 (Tex. App. 1996)).[7]

---

[7] To be sure, as this Court explained in *United States v. Olson*, 546 U.S. 43, 46 (2005), courts are not limited to consulting state cases that arise out of "the same circumstances" of liability. They may look to cases involving "like circumstances" of liability, involving "[p]rivate individuals[] who . . . [have] a relationship with third parties that is similar to the relationship" between the government employee and individual bringing suit. *Id.* at 47. As explained *infra* pages 23-25, however, there are no private individuals who have a relationship to third parties similar to that of a federal law enforcement officer to federal inmates.

Even when state law is clear on the subject, there is no justification for incorporating into the FTCA state-law respondeat superior rules that are at cross-purposes with the statute itself. When there *is* no clear state law—as in the case below—construing the FTCA to require incorporation of state law becomes wholly unworkable, as well. Courts—like the courts below—are left with no tools other than inapt precedent, and no choice but to make their own judgments about which, if any, intentional torts of law enforcement officers fall within the "scope of employment." This Court should grant review to address this problem and the confusion it has generated, and to clarify the relationship between state and federal law in construing the "scope of employment" requirement of the FTCA.

II. The Court Should Grant the Petition To Resolve a Growing Divide Over the Correct Understanding of the Scope of Employment of Law Enforcement Officials.

1. The court of appeals' decision in this case exacerbates a growing divide among the state and federal courts with respect to the correct understanding of the scope of employment of law enforcement officers. *See Doe v. City of Chicago*, 360 F.3d 667, 671 (7th Cir. 2004) (Posner, J.) (collecting cases); Rochelle Rubin Weber, *Note, "Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 Minn. L. Rev. 1513, 1523-1530 & n.32-65 (1992) (describing different approaches and collecting cases).

a. A number of states have recognized that sexual assault by law enforcement officers generally,

and prison officials in particular, falls within the scope of those officers' employment. *See, e.g., Red Elk ex rel. Red Elk v. United States*, 62 F.3d 1102, 1107 (8th Cir. 1995) (interpreting South Dakota law to hold police officers acted within scope of employment when they ordered a curfew-violating minor into the back seat of their car and raped her); *Latullas v. State*, 658 So. 2d 800, 801 (La. Ct. App. 1995) (holding correctional officer acted within scope of employment when he used authority as work crew supervisor to order female inmate to accompany him to trailer, where he raped her); *Mary M. v. City of Los Angeles*, 814 P.2d 1341, 1352 (Cal. 1991) (holding police officer acted within scope of employment where he used his authority to stop a female motorist, order her in his car, and rape her, threatening to jail her if she resisted); *see also Doe v. Forrest*, 853 A.2d 48, 61 (Vt. 2004) (holding that sheriff's department could be held vicariously liable for sexual abuse committed by police officer who "was able to separate the plaintiff from her companions because of the force and authority of [his] position").

These jurisdictions recognize, as did Congress in adopting the 1974 amendment, that the government should be held responsible for the acts of law enforcement officials taken under color of state or federal law. Unlike any other type of employee, public or private, a law enforcement officer has been given "intimidating authority" by the State. *Norris ex rel. West v. Waymire*, 114 F.3d 646, 649 (7th Cir. 1997); *see Doe v. City of Chicago*, 360 F.3d at 671 (noting that an officer "may seem to be above the law"). "Indispensable to law and order, he is also and inescapably a dangerous instrumentality. . . . [T]he

power of a rogue police officer to do harm is so great that more than ordinary care on the part of his employer may be required in order to provide adequate protection to the public." *Doe v. City of Chicago*, 360 F.3d at 671. Given these realities, a rule holding officer assault to be within the scope of employment is the logical "wave of the future." *Id.*

b. Other jurisdictions nonetheless have flatly rejected claims that a sexual assault committed by a law enforcement officer could ever be within the scope of employment. *See, e.g.*, *City of Sharonville v. American Employers Ins.*, 846 N.E.2d 833, 838 n.4 (Ohio 2006) ("Certainly, sexual assaults are not within the scope of employment of a law-enforcement officer, even when the assault could not have occurred 'but for' the perpetrator's authority as an officer of the law to detain the victim or to enter her home.") (citations omitted); *Frazier v. Badger*, 603 S.E.2d 587, 591 (S.C. 2004) ("[S]exual harassment by a government employee is not within the employee's 'scope of employment.'"); *see also Shantelle S. v. State*, No. 110268, 2006 WL 1141199, at *3 (N.Y. Ct. Cl. 2006) ("[S]exual assaults are not the kind of intentional torts that may render the employer liable under the doctrine because they are clearly perpetrated for the employee's own purposes."); *Doe v. White*, No. 00 C 0928, 2003 WL 256889, at *4 (N.D. Ill. 2003) ("Illinois courts have consistently found acts of sexual misconduct to be outside of the scope of employment as a matter of law.").

2. This division of authority is intolerable in the context of intentional tort liability under the FTCA. Though variances in state law ordinarily present no issue for this Court, a rule construing the FTCA so

that it incorporates those variances is a different matter. The FTCA is a *federal* statute, providing that the *federal* government may be held liable for the intentional torts of *federal* law enforcement officials. *Cf. Molzof v. United States*, 502 U.S. 301, 305 (1992) ("[T]he meaning of the term 'punitive damages' as used in [28 U.S.C.] § 2674 [of the FTCA], a federal statute, is by definition a federal question."). There is no reason that the scope of that liability should depend on the particular jurisdiction in which a federal officer commits an intentional tort. Such happenstance is particularly troubling in the case of federal prisoners, whom the government has "the power to transfer . . . to facilities in any one of several States[,] . . . thereby controlling to some extent the law that would apply to [its] own wrongdoing." *Carlson v. Green*, 446 U.S. 14, 25 n.11 (1980).

Indeed, the legislative history of the FTCA makes plain that "Congress had in mind no such patchwork plan for securing" redress against the government. *NLRB v. Hearst Publications*, 322 U.S. 111, 123 (1944) (interpreting the National Labor Relations Act); *see Feres*, 340 U.S. at 143 ("It would hardly be a rational plan of providing for [members of the military injured by military employees] to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value."). Even if

> [s]uch a variegated pattern of culpability . . . ma[d]e sense in the context of negligent tort recovery, . . . its rationale in suits against law enforcement officials for intentional torts [would be] unjustified. The [1974] amendment seeks to establish a standard of appro-

> priate conduct for all federal officials who are charged with responsibility for ensuring constitutional rights. To make this demonstrably federal standard dependent upon state law turns the liability question on its head.

Boger, *et al.*, 54 N.C. L. Rev. at 521. As Justice Harlan explained in the context of *Bivens* suits, it is "entirely proper that [injuries inflicted by federal officials acting under color of law] be compensable according to uniform rules of federal law." *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 409 (1971) (Harlan, J., concurring).[8]

The justification for a uniform national standard is at least as compelling in the FTCA context. Only a uniform rule will allow federal law enforcement officers, who are often assigned to work in regions that include several states, effectively to avoid that conduct that will result in government liability, *see* Rosky, 36 U.C. Davis L. Rev. at 914, and ensure that

---

[8] This Court has recently elaborated in other contexts the reasons why federal employment laws should implement uniform national standards of respondeat superior. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-755 (1998) ("In express terms, Congress has directed federal courts to interpret Title VII based on agency principles. Given such an explicit instruction, we conclude a uniform and predictable standard must be established as a matter of federal law. We rely 'on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.'"); *see also Baker v. Texas & P. Ry. Co.*, 359 U.S. 227, 228 (1959) ("The Federal Employers' Liability Act does not use the terms 'employee' and 'employed' in any special sense, . . . so that the familiar general legal problems as to whose 'employee' or 'servant' a worker is at a given time present themselves as matters of federal law under the Act.").

federal courts fully effectuate the requirements and purposes of the FTCA.

The decision of the court of appeals, incorporating a view of state law under which the intentional torts of law enforcement officers can rarely, if ever, be deemed within the "scope of employment," exacerbates the conflict in authority on this point. The existence of that conflict is inconsistent with the FTCA and its 1974 amendment, which can be given effect only through a uniform national standard of liability. Accordingly, this Court should grant review and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER GOLDBERGER
50 RITTENHOUSE PLACE
ARDMORE, PA 19003
(610) 649-8200

ARCHIBALD COWAN MCCOLL
MCCOLL & MCCOLLOCH
1601 ELM STREET
DALLAS, TX 75201
(214) 979-0999

PAMELA HARRIS*
(Counsel of Record)
HARVARD LAW SCHOOL
SUPREME COURT AND
APPELLATE PRACTICE
CLINIC

WALTER DELLINGER
KATHRYN E. KOMP**
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300
**May be contacted at O'Melveny & Myers LLP*

***Admitted only in Wisconsin; supervised by principals at the firm*

Dated: October 15, 2007

APPENDIX

APPENDIX A

FILED
May 17, 2007
Charles R.
Fulbruge III,
Clerk

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 06-10654

MARILYN SHIRLEY and RAYMOND DOUGLAS SHIRLEY,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
4:03-CV-1385

Before KING, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:*

Appellant-Plaintiff Marilyn Shirley ("Shirley") appeals the district court's order granting summary judgment in favor of the Defendant-Appellee the United States of America on her claims brought under the Federal Tort Claims Act ("FTCA"). For the reasons that follow, we AFFIRM.

In January 1998, Plaintiff Marilyn Shirley ("Shirley") entered the federal prison at Federal Medical Center Carswell ("FMCC"), a relaxed supervision facility located in Fort Worth, Texas, to begin serving a 37-month sentence on a drug conviction. On March 11, 2000, Officer Michael Lawrence Miller, a correctional officer at FMCC, sexually assaulted Shirley.

In November 2003, after successfully pursuing a civil action against Miller, Shirley sued the United States under 28 U.S.C. § 1346(b) of the FTCA. She asserted claims under the theory of respondeat superior for intentional infliction of emotional distress, battery, assault, false imprisonment, negligence per se, and negligence. The government moved for summary judgment on all of Shirley's claims, arguing that the FTCA's waiver of sovereign immunity did not apply because Miller was not acting within the scope of his employment during the sexual assault. The district court agreed and

---

*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

granted the government's motion. Shirley lodges this appeal.

As the sovereign, the United States is immune from suit unless, and only to the extent that, it has consented to be sued.[1] Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its agents and employees who act within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[2] Under Texas law, an employee acts within the scope of his employment if his actions are: (1) within the general authority given him; (2) in furtherance of the employer's business; and (3) for the accomplishment of the object for which the employee was employed.[3] The district court concluded that Miller's actions were not within the scope of employment because the sexual assault did not advance the United States's work, as required by prongs (2) and (3), and instead constituted a wholly personal action.[4]

---

[1] FDIC v. Meyers, 510 U.S. 471, 475-76 (1994).

[2] 28 U.S.C. § 1346(b)(1); Garcia v. United States, 62 F.3d 126, 127 (5th Cir. 1995) (en banc).

[3] Ross v. Marshall, 426 F.3d 745, 763-64 (5th Cir. 2005) (citing numerous Texas cases).

[4] See Mackey v. U.P. Enters, Inc., 935 S.W.2d 446, 453 (Tex. App. 1996, no writ) (explaining that, under Texas law, where an employee turns away from the advancement of the employer's work to engage in wholly personal actions, he ceases to act for the employer, and the responsibility for those personal actions is upon him alone).

On appeal, Shirley argues that while the district court correctly articulated the general test for scope of employment in Texas, it failed to recognize and apply other Texas cases which have extended vicarious liability to an employer for an employee's actions despite a failure to fulfill all three prongs of the above test. Shirley specifically seeks to avoid prongs (2) and (3), which require some business purpose be attributable to the acts surrounding or leading to the wrongful conduct. However, the cases discussed by Shirley fail to support this argument because they involved instances where the employee's act was closely related to a legitimate employment goal or duty.[5] Shirley fails to allege that a similar legitimate employment interest animated Miller's sexual assault in the instant case.

We similarly reject Shirley's arguments based on foreseeability and apparent authority. None of the cases relied upon are sufficiently analogous nor do they serve to excuse a plaintiff in this context from making a showing that an employee's wrongful act grew out of a legitimate employment duty or goal.[6]

---

[5] See Gulf, C. & S.F. Ry. Co. v. Cobb, 45 S.W.2d 323, 326 (Tex. App. 1931, writ dism'd w.o.j.) (employee's act would be imputed to the employer where the employee was acting to prevent his victim from interfering with the performance of the employee's assigned duties); Houston Transit Co. v. Felder, 208 S.W.2d 880, 882 (Tex. 1948) (evidence raised a jury issue as to the company's liability for an assault by its employee where employee testified that his purpose in approaching motorist was to secure information for his employer).

[6] Shirley relies on the following cases: Hooper v. Pitney Bowes, Inc., 895 S.W.2d 773, 777 (Tex. App. 1995, no writ) (explaining that the actions of an employee who is deemed to have acted within the scope of his employment are generally imputed to the employer but that an exception applies where

Finally, we reject Shirley's argument that the government's successful criminal prosecution of Miller for abuse of a ward serves to estop the government from arguing that Miller was acting outside the scope of his employment during the sexual assault. A conviction under 18 U.S.C. § 2243(b) does not establish scope of employment under Texas law.

AFFIRMED.

---

the acts are unforeseeable); Borg-Warner Protective Services Corp. v. Flores, 955 S.W.2d 861 (Tex. App. 1997, no writ) (finding that supervisor's rape of a female subordinate would establish a constructive discharge).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-10654

MARILYN ANN SHIRLEY; RAYMOND DOUGLAS SHIRLEY; ANGEL SHIRLEY; AARON SHIRLEY

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

FILED
JUL 16 2007
Charles R. Fulbridge, III
CLERK

Appeal from the United States District Court for the Northern District of Texas, Fort Worth

---

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 5/17/07, 5 Cir., _____, _____, F.3d _____)

Before KING, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARILYN SHIRLEY	§	
and	§	
RAYMOND DOUGLAS	§	
SHIRLEY	§	
	§	CIVIL ACTION NO.
V.	§	4:03-CV-1385-Y
	§	
UNITED STATES OF	§	
AMERICA	§	

ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT AND DENYING
MOTION FOR PARTIAL SUMMARY JUDGMENT

Pending before the Court is Defendant's motion for summary judgment [doc. # 48], filed August 2, 2005, and Plaintiffs' motion for partial summary judgment [doc. # 53], filed August 10, 2005. After consideration, the Court GRANTS Defendant's motion and DENIES Plaintiffs' motion.

I. BACKGROUND

The facts of this case are largely undisputed. In January 1998, Plaintiff Marilyn Shirley entered the federal prison at Federal Medical Center Carswell (FMC Carswell) to begin serving a 37-month sentence for her conviction for unlawful use of a communication device to facilitate the distribution of

a controlled substance. On March 11, 2000, Officer Michael Lawrence Miller, a correctional officer at FMC Carswell, sexually assaulted Shirley. Understandably fearful, Shirley hid the clothes she was wearing and did not immediately report the assault. When she was discharged from FMC Carswell on September 8, 2000, Shirley reported the assault to a correctional officer and to the camp administrator. To back up her claim, she provided the clothes she had been wearing at the time of the assault and had been hiding for six months. An investigation was opened, and Miller was assigned to other duties at another facility.

Shirley sued Miller in a *Bivens* action. [1] On June 3, 2003, a jury awarded Shirley $4,000,000 in damages. Miller was then indicted for aggravated sexual abuse, sexual abuse of a ward, abusive sexual contact, abusive sexual contact, and assault within special maritime and territorial jurisdiction of the United States. A jury convicted Miller on all five counts, and, on July 2, 2004, Miller was sentenced to 150 months' imprisonment. That same day, the district court dismissed the count for assault within special jurisdiction as a lesser-included offense. After his conviction, Miller was fired.

On November 26, 2003, Shirley and her husband, Raymond Douglas Shirley,[2] sued the United States

---

[1] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] Plaintiffs were originally Shirley, her husband, and their two children. However, the third amended complaint only lists Shirley and her husband as plaintiffs.

under the Federal Tort Claims Act ("the FTCA"). *See* 28 U.S.C.A. §§ 1346(b), 2671-80 (West 1994 & Supp. 2005). She raises a claim for negligent hiring, training, supervision, and retention; under the theories of vicarious liability and respondeat superior, she alleges (1) intentional infliction of emotional distress, (2) battery, (3) assault, (4) false imprisonment, (5) negligence per se, and (6) negligence. The United States moves for summary judgment on all of Shirley's claims, and Shirley argues she is entitled to summary judgment on all claims except her claim for negligent hiring, training, supervision, and retention.

II. SUMMARY-JUDGMENT STANDARD

Summary judgment is appropriate when the record establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of demonstrating that it is entitled to a summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party need not produce evidence showing the absence of a genuine issue of material fact with respect to an issue on which the nonmovant bears the burden of proof. Rather, in that situation, the moving party need only point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmovant's claim. *Id.* at 323-35. Where, however, the moving party bears the burden of proof on the claim upon which it seeks summary judgment, it must present evidence that establishes "beyond peradventure *all* the essential

elements of the claim or defense." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

When the moving party has carried its summary judgment burden, the nonmovant must go beyond the pleadings and by its own affidavits or by the depositions, answers to interrogatories, or admissions on file set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

In making its determination on the motion, the Court must look at the full record in the case. *See* Fed. R. Civ. P. 56(c); *Williams v. Adams*, 836 F.2d 958, 961 (5th Cir. 1988). Nevertheless, Rule 56 "does not impose on the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). Instead, parties should "identify specific evidence in the record, and...articulate the 'precise manner' in which that evidence support[s] their claim." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994).

III. DISCUSSION

A. NEGLIGENT HIRING, TRAINING, SUPERVISION, AND RETENTION

Shirley asserts that the United States was negligent in training its officers with regard to the implementation of policies and procedures relating to the prevention of sexual violence and advances, the identification of individuals involved in instigating sexua l violence and advances, and the reporting of such sexual violence and advances when it came to their knowledge. She further argues that the United States was negligent in implementing these policies and procedures and in supervising its officers regarding the policies and procedures. (3d Am. Comp. at 6-7.)

As the sovereign, the United States is immune from suit unless, and only to the extent that, it has consented to be sued. *FDIC v. Meyer*, 510 U.S. 471, 475-76 (1994). Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its agents who act within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. § 1346(b)(1) (Supp. 2005); *see also Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994). However, immunity applies if the negligence claim is based on the federal employee's "exercise or performance or the failure to exercise or perform a discretionary function or duty." 28 U.S.C.A. § 2680(a) (1994). If a government action or decision falls within the discretionary exception, this Court lacks subject-matter jurisdiction over the matter. *See ALX El Dorado, Inc. v. Sw. Sav. & Loan Ass'n/FSLIC*, 36 F.3d 409, 410 n.5 (5th Cir. 1994). But if a federal statute, regulation, or policy

specifically prescribes a course of action for an employee to follow, the act is nondiscretionary, and immunity does not apply. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991). The FTCA exceptions to immunity must be strictly construed in favor of the United States. *See Truman*, 26 F.3d at 594.

To determine whether the discretionary-function exception applies, a two-part test applies. First, the government acts must be discretionary, i.e., the acts must involve "an element of judgment or choice" in order to be protected by the exception. *Id.* Second, even if the governmental acts are found to involve judgment or choice, such action must be of the kind that the exception was designed to shield. *See id.* at 322-23. Thus, the exception protects only government action that is based on public-policy considerations. *See id.*

Courts have repeatedly held that employment decisions, i.e., the manner in which the United States selects, trains, and supervises its employees, are discretionary functions. *See, e.g., Nurse v. United States*, 226 F.3d 996, 1001-02 (9th Cir. 2000); *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997); *Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995); *Richman v. Straley*, 48 F.3d 1139, 1146-47 (10th Cir. 1995); *Attallah v. United States*, 955 F.2d 776, 784-85 (1st Cir. 1992); *Dretar v. Smith*, 752 F.2d 1015, 1017 n.2 (5th Cir. 1985). This case is no different. Shirley points to regulations and statutes that provide that the Bureau of Prisons has a duty to provide a safe environment and protect its inmates. (Shirley Resp. at 15-16.) However, these statutes and regulations

do not limit or deny the existence of discretion for implementing that specific policy. Imposing a duty with no specific designation of how to carry out such authority is the essence of discretion. Thus, because the United States' employment decisions are discretionary functions, the United States is immune from this claim.

B. CLAIMS RAISED UNDER VICARIOUS LIABILITY/RESPONDEAT SUPERIOR

Shirley asserts that the United States is liable for the actions of Miller under the doctrines of respondeat superior and vicarious liability and raises the following claims: intentional infliction of emotional distress, battery, assault, false imprisonment, negligence per se, and negligence. Both Shirley and the United States argue that they are entitled to judgment as a matter of law on these claims.

As stated above, the waiver of sovereign immunity in the FTCA only covers torts committed by government employees acting within the scope of their employment. *See Sheridan v. United States*, 487 U.S. 392, 400-01 (1988). The issue of scope of employment is determined under state law. *See* 28 U.S.C.A. § 1346(b); *Garcia v. United States*, 62 F.3d 126, 127 (5th Cir. 1995). In Texas, an employee acts within the scope of his employment if his actions are (1) within the general authority given him, (2) in furtherance of the employer's business, and (3) for the accomplishment of the object for which the employee was employed. *See Williams v. United States*, 71 F.3d 502, 506 (5th Cir. 1995); *Green v. Ransor, Inc.*, 175 S.W.3d 513, 516 (Tex. App. 2005, no pet.); *Mackey v. U.P. Enters., Inc.*, 935 S.W.2d 446,

453 (Tex. App. 1996, no writ); *Drooker v. Saeilo Motors*, 756 S.W.2d 394, 397 (Tex. App. 1988, writ denied). When an employee turns away from the advancement of the employer's work to engage in wholly personal actions, he ceases to act for the employer, and the responsibility for those personal actions is upon him alone. *Mackey*, 935 S.W2d at 453. It is clear here that Miller's actions were not work-related. In sexually assaulting Shirley, Miller stepped aside from his employment to accomplish his own, rather than the United States', purpose. *See, e.g., City of Green Cove Springs v. Donaldson*, 348 F.2d 197, 203 (5th Cir. 1965); *Mackey*, 935 S.W.2d at 453-54. *See generally* Rochelle Rubin Weber, Note, *"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 Minn. L. Rev. 1513, 1521-22 & nn.33-34 (1992) (collecting cases holding sexual assault falls outside scope of employment).

IV. CONCLUSION

While Miller's actions are abhorrent, the immunity granted to the United States cannot be surmounted in this case. Thus, the United States is entitled to judgment as a matter of law.

SIGNED March 21, 2006.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARILYN SHIRLEY	§	
and	§	
RAYMOND DOUGLAS	§	
SHIRLEY	§	
	§	CIVIL ACTION NO.
V.	§	4:30-CV-1385-Y
	§	
UNITED STATES OF	§	
AMERICA	§	

FINAL JUDGMENT

Pursuant to the order issued this same day and Federal Rule of Civil Procedure 58,

It is hereby ORDERED, ADJUDGED, and DECREED that Defendant is entitled to judgment as a matter of law and that Plaintiffs take nothing on their claims. It is further ORDERED, ADJUDGED, and DECREED that such claims be and are hereby DISMISSED WITH PREJUDICE. All costs under 28 U.S.C. § 1920 shall be taxed against Plaintiffs.

SIGNED March 21, 2006.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

MARILYN SHIRLEY, RAYMOND DOUGLAS SHIRLEY	§	
	§	**CAUSE NO.**
vs.	§	**4:03-CV-1385-Y**
	§	
UNITED STATES OF AMERICA	§	

ORDER DENYING MOTION FOR RECONSIDERATION

Pending before the Court is Plaintiffs' motion for reconsideration [doc. # 82], filed April 4, 2006. After consideration, the Court DENIES the motion. Plaintiffs ask this Court to alter or amend the March 21 judgment granting Defendant's motion for summary judgment. *See* Fed. R. Civ P. 59(e). Absent highly unusual circumstances, reconsideration under Rule 59(e) is appropriate only where: (1) the Court committed clear error or the initial decision was manifestly unjust, (2) the Court is presented with newly discovered evidence, or (3) there is an intervening change in controlling law. *See Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003); *Sch. Dist. No. 1J, Multnomah County, Or. v. AC&S, Inc.*, 5 F.3d 1255, 1262 (9th

Cir. 1993). Plaintiffs have failed to meet this high threshold.

Signed May 9, 2006.

/s/ Terry R. Means
TERRY R. MEANS
UNITED STATES
DISTRICT JUDGE

APPENDIX F

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Tort Claims Act are codified at 28 U.S.C. §§ 1346(b)(1), 2680(a) and 2680(h) as follows:

§ 1346. United States as defendant

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2680. Exceptions

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty

on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

3

No. 07-501

In the Supreme Court of the United States

MARILYN SHIRLEY AND RAYMOND DOUGLAS SHIRLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
THOMAS M. BONDY
CHRISTOPHER J. WALKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly applied "the law of the place where the act or omission occurred" to determine "scope of employment" under the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 7
Attallah v. *United States*, 955 F.2d 776 (1st Cir. 1992) ... 9
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 4, 12
Carlson v. *Green*, 446 U.S. 14 (1980) 12
Cooner v. *United States*, 276 F.2d 220 (4th Cir. 1960) 9
Duffy v. *United States*, 966 F.2d 307 (7th Cir. 1992) 9
Flechsig v. *United States*, 991 F.2d 300 (6th Cir. 1993) 9
Garcia v. *United States*:
799 F. Supp. 674 (W.D. Tex. 1992), rev'd in relevant part, 62 F.3d 126 (5th Cir. 1995) 8
62 F.3d 126 (5th Cir. 1995) 9
Indian Towing Co. v. *United States*, 350 U.S. 61 (1995) 9, 10
Leavitt v. *Jane L.*, 518 U.S. 137 (1996) 13
Mackey v. *U.P. Enters.*, 935 S.W.2d 446 (Tex. App. 1996) 13

Cases–Continued: Page

McSwain v. *United States*, 422 F.2d 1086 (3d Cir. 1970) 9
Nelson v. *United States*, 838 F.2d 1280 (D.C. Cir. 1988) 9
O'Toole v. *United States*, 284 F.2d 792 (2d Cir. 1960), cert. denied, 366 U.S. 927 (1961) 7, 9
Pattno v. *United States*, 311 F.2d 604 (10th Cir. 1962), cert. denied, 373 U.S. 911 (1963) 9
Piper v. *United States*, 887 F.2d 861 (8th Cir. 1989) 9
Primeaux v. *United States*, 181 F.3d 876 (8th Cir. 1999), cert. denied, 528 U.S. 1154 (2000) 8
Ross v. *Marshall*, 426 F.3d 745 (5th Cir. 2005), cert. denied, 127 S. Ct. 1125 (2007) 13
S.J. & W. Ranch, Inc. v. *Lehtinen*, 913 F.2d 1538 (11th Cir. 1990), amended by 924 F.2d 1555 (11th Cir.), cert. denied, 502 U.S. 813 (1991) 9
Sheridan v. *United States*, 487 U.S. 392 (1988) 4
United States v. *Gaubert*, 499 U.S. 315 (1991) 4
United States v. *Miller*, 132 Fed. Appx. 10 (5th Cir.), cert. denied, 546 U.S. 939 (2005) 3
United States v. *Muniz*, 374 U.S. 150 (1963) 9
United States v. *Olson*, 546 U.S. 43 (2005) 2, 10
United States v. *Ortiz*, 422 U.S. 891 (1975) 7
United States v. *Varig Airlines*, 467 U.S. 797 (1984) 2
Washington v. *United States*, 868 F.2d 332 (9th Cir.), cert. denied, 493 U.S. 992 (1989) 9
Williams v. *United States*, 215 F.2d 800 (9th Cir. 1954) 7
Williams v. *United States*, 350 U.S. 857 (1955) 7, 9, 11

Case–Continued: Page

Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 7

Statutes and regulations:

Federal Tort Claims Act:
28 U.S.C. 1346(b) 2, 3, 11, 12
28 U.S.C. 1346(b)(1) 8, 10, 11
28 U.S.C. 2671 *et seq.* 2
28 U.S.C. 2680(a) 2
28 U.S.C. 2680(h) 2, 3, 10, 11
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 11
Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) (Vernon 2005) 10

In the Supreme Court of the United States

No. 07-501

MARILYN SHIRLEY AND RAYMOND DOUGLAS SHIRLEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-5a) is not published in the *Federal Reporter* but is reprinted in 232 Fed. Appx. 419. The decision of the district court (Pet. App. 8a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2007. A petition for rehearing was denied on July 16, 2007. Pet. App. 6a-7a. The petition for a writ of certiorari was filed on October 11, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises out of a claim that petitioners Marilyn and Raymond Shirley filed against the United States

government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, seeking to recover damages arising from the sexual assault of Ms. Shirley by a corrections officer while she was incarcerated in a federal penitentiary.

1. The FTCA provides a limited waiver of sovereign immunity, allowing the United States to be held liable for torts committed by "any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b); see *United States* v. *Olson*, 546 U.S. 43, 44-45 (2005). The FTCA's waiver of sovereign immunity contains several exceptions, two of which are pertinent to this case.

First, the United States retains its sovereign immunity if the claim is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States* v. *Varig Airlines*, 467 U.S. 797, 808 (1984). Because tort actions challenging discretionary policy judgments could "seriously handicap efficient government operations," *id.* at 814 (citation omitted), Congress retained the United States' sovereign immunity in that area. The exception is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and

political policy through the medium of an action in tort." *Ibid.*

Second, Congress excepted most intentional torts from the FTCA's waiver of sovereign immunity—*i.e.*, "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. 2680(h). In 1974, Congress carved out an exception to that immunity for intentional torts: "[W]ith regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." *Ibid.* Congress defined "investigative or law enforcement officers" to include "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.*

2. In 1998, Ms. Shirley entered a federal prison at the Federal Medical Center Carswell in Fort Worth, Texas, to begin serving a 37-month sentence for unlawful use of a communication device to facilitate the distribution of a controlled substance. Pet. App. 8a-9a. In 2000, Officer Michael Lawrence Miller, a correctional officer at the prison, sexually assaulted Shirley. *Id.* at 9a. After an investigation of the incident, Miller was assigned to other duties at the prison. *Ibid.* The United States subsequently brought criminal charges against Miller, and a jury ultimately convicted him of aggravated sexual abuse, sexual abuse of a ward, and abusive sexual contact. He was sentenced to a total of 150 months in prison. *Ibid.*; see *United States* v. *Miller*, 132

Fed. Appx. 10 (5th Cir.) (affirming conviction), cert. denied, 546 U.S. 939 (2005). Ms. Shirley also sued Miller in a *Bivens* action, and a jury awarded her $4 million in damages. Pet. App. 9a & n.1 (citing *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

3. Petitioners then brought the present action against the United States under the FTCA, raising claims for negligent hiring, training, supervision, and retention, as well as claims, under theories of vicarious liability and *respondeat superior*, for intentional infliction of emotional distress, battery, assault, false imprisonment, negligence per se, and negligence. Pet. App. 9a-10a. The district court granted the government's motion for summary judgment. *Id.* at 16a-17a.

First, the district court held that the United States is immune from suit for its discretionary decisions in selecting, training, and supervising its employees. Pet. App. 13a-14a (citing cases). Applying the standard set forth in *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991), the district court explained that no statute or regulation "limit[ed] or den[ied] the existence of discretion for implementing [any] specific [prison safety] policy," and "[i]mposing a duty with no specific designation of how to carry out such authority is the essence of discretion." Pet. App. 13a-14a.

Second, the district court held the United States immune from suit under petitioners' theories of vicarious liability and *respondeat superior*. The court explained that "the waiver of sovereign immunity in the FTCA only covers torts committed by government employees acting within the scope of their employment." Pet. App. 14a (citing *Sheridan* v. *United States*, 487 U.S. 392, 400-401 (1988)). Here, the parties agreed that scope of em-

ployment was determined by Texas law. See, *e.g.*, Pet. Summ. J. Br. 12 ("Thus, the substantive law of the State of Texas is controlling with respect to the liability of the defendant United States. * * * A review of the Texas case law regarding scope of employment for purposes of imposing vicarious liability/*respondeat superior* illustrates that Miller's conduct was plainly within the scope of his employment."). Applying Texas law, the court concluded that the United States could not be held liable because, in sexually assaulting an inmate, "Miller stepped aside from his employment to accomplish his own, rather than the United States', purpose." Pet. App. 15a.

4. On appeal, petitioners challenged only the district court's vicarious liability holding, and not its discretionary function holding. Pet. C.A. Br. 1, 6. As the court of appeals noted, petitioners further conceded that "the district court correctly articulated the general test for scope of employment in Texas," and were appealing only whether the district court properly applied the exceptions to that test as recognized under Texas law. Pet. App. 4a; see Pet. C.A. Br. 7 ("Texas law controls whether liability can be imputed on [*sic*] the United States for Miller's actions. * * * Under Texas law, an employer is vicariously liable for acts of its employee committed within the course and scope of his employment."). The court of appeals rejected petitioners' argument for vicarious liability because, unlike in the Texas state court cases on which petitioners relied, "Shirley fails to allege that a [] legitimate employment interest animated Miller's sexual assault in the instant case." Pet. App. 4a. The court of appeals thus affirmed the district court's judgment for the United States in an unpublished per curiam decision. *Id.* at 5a.

5. Petitioners filed a petition for rehearing and rehearing en banc, arguing that the panel erred by misconstruing Texas law governing scope of employment. See Pet. for Reh'g 5 ("The panel erred in determining that Texas would not allow liability in like circumstances."). The court of appeals denied petitioners' request for rehearing. No judge voted for rehearing or rehearing en banc. Pet. App. 6a-7a.

ARGUMENT

The unpublished decision of the court of appeals is correct on the merits and does not conflict with any decision of this Court or of any other court of appeals. Petitioners' sole argument is that scope of employment for FTCA purposes should not be determined by state law, but by a "uniform national standard of liability." Pet. 27. Because petitioners raise that argument for the first time in their petition for a writ of certiorari, and because petitioners' argument lacks merit, this Court's review is unwarranted.

1. As an initial matter, petitioners failed to raise before the district court or court of appeals the argument they now make in their petition for a writ of certiorari. Petitioners did not argue in either court that scope of employment for FTCA purposes should be determined by a national standard. Instead, petitioners asserted that "the substantive law of the State of Texas is controlling with respect to the liability of the defendant United States." Pet. Summ. J. Br. 12; see *ibid.* ("A review of the Texas case law regarding scope of employment for purposes of imposing vicarious liability/*respondeat superior* illustrates that Miller's conduct was plainly within the scope of his employment."); Pet. C.A. Br. 7 ("Texas law controls whether liability can be imputed on

the United States for Miller's actions * * * . Under Texas law, an employer is vicariously liable for acts of its employee committed within the course and scope of his employment."). Accordingly, this Court should decline to consider petitioners' current argument that the court of appeals erred in applying state law to determine scope of employment. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue raised for the first time on appeal by a party who advocated a contrary position in the court below); see also *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

2. Even if petitioners had preserved the argument, this Court's review would be unwarranted. This Court has long held, as petitioners concede, that the issue of scope of employment is controlled by the applicable state law of *respondeat superior*. See *Williams* v. *United States*, 350 U.S. 857, 857 (1955) (per curiam) ("This case is controlled by the California doctrine of respondeat superior.").[1] Both the district court and the court of appeals in the instant case properly applied the Texas law of *respondeat superior*, consistent with this Court's

---

[1] In the original panel decision in *Williams*, the Ninth Circuit had crafted a special rule in FTCA cases involving tortious acts of a member of the armed forces, asking whether the soldier was acting in the line of duty. See *Williams* v. *United States*, 215 F.2d 800, 806-810 (9th Cir. 1954). Rejecting that special rule, this Court vacated and remanded the case, instructing the Ninth Circuit simply to apply the state rule. *Williams* thus established that scope of employment under the FTCA is a question of state, not federal, law. See *O'Toole* v. *United States*, 284 F.2d 792, 795 (2d Cir. 1960), cert. denied, 366 U.S. 927 (1961).

well-settled precedent, to determine that the correctional officer did not act within the scope of his employment.

Contrary to petitioners' assertions, see Pet. 12, 13, 15, 16, 19, 20, 22, 27, there is no conflict, confusion, or uncertainty regarding whether scope of employment for FTCA purposes is determined by "the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Petitioners' main authority for any such "confusion" is an isolated district court decision, which was reversed by the Fifth Circuit on that specific question. See Pet. 13, 14, 15 (citing *Garcia* v. *United States*, 799 F. Supp. 674 (W.D. Tex. 1992), rev'd in relevant part, 62 F.3d 126 (5th Cir. 1995) (en banc) (per curiam)). Petitioners also point to a dissenting opinion in *Primeaux* v. *United States*, 181 F.3d 876 (8th Cir. 1999) (en banc), cert. denied, 528 U.S. 1154 (2000), apparently for the proposition that the 1974 amendment to the FTCA changed the scope-of-employment analysis for intentional torts committed by law enforcement officers. See Pet. 16, 19-20. That dissent, however, does not support petitioners' position. Rather, the dissent specifically took issue with the majority's interpretation of South Dakota state law on *respondeat superior*, and reaffirmed the general principle that, even in light of the 1974 amendment, "[i]t is evident from the legislative history of the FTCA and, more importantly, from the Supreme Court itself that scope of employment is defined by the fullest extent of state *respondeat superior* law." *Primeaux*, 181 F.3d at 885 (Lay, J., dissenting); see *id.* at 882 n.1 ("All of the circuits including this court have held that liability of the United States may be imposed under the Federal Tort Claims Act * * * if a private

employer would be liable under state law *respondeat superior* where the wrongful conduct took place.") .

Indeed, every circuit has reached the same conclusion: "[W]hether a particular federal employee was or was not acting within the scope of his employment is controlled by the law of the state in which the negligent or wrongful conduct occurred." *Garcia* v. *United States*, 62 F.3d 126 (5th Cir. 1995) (citing *Williams*, 350 U.S. 857); see *Nelson* v. *United States*, 838 F.2d 1280, 1282 (D.C. Cir. 1988); *Attallah* v. *United States*, 955 F.2d 776, 781 (1st Cir. 1992); *O'Toole* v. *United States*, 284 F.2d 792, 795 (2d Cir. 1960), cert. denied, 366 U.S. 927 (1961); *McSwain* v. *United States*, 422 F.2d 1086, 1088 (3d Cir. 1970); *Cooner* v. *United States*, 276 F.2d 220, 224 (4th Cir. 1960); *Flechsig* v. *United States*, 991 F.2d 300, 302 (6th Cir. 1993); *Duffy* v. *United States*, 966 F.2d 307, 314 (7th Cir. 1992); *Piper* v. *United States*, 887 F.2d 861, 863 (8th Cir. 1989); *Washington* v. *United States*, 868 F.2d 332, 334 (9th Cir.), cert. denied, 493 U.S. 992 (1989); *Pattno* v. *United States*, 311 F.2d 604, 607 (10th Cir. 1962), cert. denied, 373 U.S. 911 (1963); *S.J. & W. Ranch, Inc.* v. *Lehtinen*, 913 F.2d 1538, 1542 (11th Cir. 1990), amended by 924 F.2d 1555 (11th Cir.), cert. denied, 502 U.S. 813 (1991).[2]

---

[2] Petitioners also assert that this case "conflicts with the decisions of this Court in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), and *United States* v. *Muniz*, 374 U.S. 150 (1963)." Pet. 12. Those cases, however, do not address the scope of employment for FTCA purposes. Instead, they reject the proposition that the FTCA incorporates state immunity laws for government actors—*i.e.*, "the casuistries of municipal liability for torts," *Indian Towing*, 350 U.S. at 65, and the "restrictive state rules of immunity," *Muniz*, 374 U.S. at 164.

Indian Towing and *Muniz* explain that the question under the FTCA is not whether a similarly situated *state government* actor would be held liable under like circumstances, but "whether a *private* individual

3. Unable to identify any genuine conflict, petitioners ask this Court to "revisit" its half-century-old decision in *Williams*, see Pet. 17 n.6, and thus overturn a precedent that has been uniformly adopted and applied by the federal courts of appeals. They argue that, since the 1974 addition of Section 2680(h), there has been "a growing divide among the state and federal courts with respect to the correct understanding of the scope of employment of law enforcement officers," Pet. 22, and "[t]here is no reason that the scope of [FTCA] liability should depend on the particular jurisdiction in which a federal officer commits an intentional tort." Pet. 25. Both the plain text of the statute and this Court's precedent, however, foreclose that argument.

a. Unlike other contexts in which uniform federal standards are imposed, Congress has expressly provided that FTCA liability depends on "the law of the

---

under like circumstances would be liable under state law." *Muniz*, 374 U.S. at 153 (emphasis added); see *Indian Towing*, 350 U.S. at 68-69 ("The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable."); see also *Olson*, 546 U.S. at 44-45 ("[T]he United States waives sovereign immunity 'under circumstances' where local law would make a '*private person*' liable in tort * * * . And we reverse a line of Ninth Circuit precedent permitting courts in certain circumstances to base a waiver simply upon a finding that local law would make a 'state or municipal entit[y]' liable."). In the instant case, the court of appeals' analysis was consistent with *Indian Towing* and *Muniz*. The court of appeals did not hold the United States immune from suit by relying on Texas law conferring blanket immunity for all claims against the state "arising out of assault, battery, false imprisonment, or any other intentional tort." Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) (Vernon 2005). Instead, it asked whether a similarly situated private person would be held liable under Texas law. Pet. App. 3a-4a.

place where the act or omission occurred." 28 U.S.C. 1346(b)(1); see *Williams*, 350 U.S. at 857 (FTCA scope of employment determined by state law); cf. Pet. 25, 26 & n.8 (citing *Bivens*, Title VII, and the National Labor Relations Act as "justification for a uniform national standard"). Liability under the FTCA based on a law enforcement officer's intentional tort is an exception to the general immunity for intentional torts that Congress preserved in the FTCA. See 28 U.S.C. 2680(h). And, in the statutory provision containing that exception, Congress specified that "the provisions of this chapter and section 1346(b) of this title shall apply to any [such] claim." *Ibid.* Therefore, the federal government may be held liable under the FTCA for a claim arising "out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" if the conditions of both statutory sections are met: (1) the tort is committed by an "investigative or law enforcement officer[]," 28 U.S.C. 2680(h), and (2) the tort is committed by said officer "while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). As discussed above, this Court and every court of appeals has recognized that the most natural reading of the plain text of Section 1346(b) incorporates state law to determine both whether an officer acts "within the scope of his employment" and whether he "would be liable to the claimant." *Ibid.* The 1974 addition of Section 2680(h) did nothing to change the text of Section 1346(b); there is therefore no reason to construe Section 1346(b) any differently in the intentional tort context.

b. Petitioners argue that, notwithstanding the plain text of the statute, FTCA liability for intentional torts committed by law enforcement officers should be based on "uniform rules of federal law," as is the case in the *Bivens* context with respect to constitutional claims. Pet. 26 (quoting *Bivens*, 403 U.S. at 409 (Harlan, J., concurring)). This Court, however, has already rejected that argument and has explained that the attempted FTCA/*Bivens* analogy is unavailing. In *Carlson* v. *Green*, 446 U.S. 14, 20 (1980), the Court held that, in the context of intentional torts committed by prison officials, victims "shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." The Court left open the availability of a *Bivens* action because, even after the 1974 amendment to the FTCA,

> an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U.S.C. § 1346(b) (United States liable "in accordance with the law of the place where the act or omission occurred"). Yet it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules.

Id. at 23. The Court's decision in *Carlson* thus makes clear that the 1974 amendment to the FTCA did nothing to change Congress's determination that FTCA liability, including any question of scope of employment, turns on state law, and that that legislative policy judgment retains full force in the intentional tort context.

4. Because it is settled in this Court and in every federal court of appeals that state law defines the

FTCA's scope-of-employment prerequisite, all that could be left for review in this case is whether the court of appeals properly applied Texas law. Petitioners, however, do not raise that issue for review in their petition for a writ of certiorari. Nor do they identify any exceptional circumstance that would justify departure from the rule that this Court does not "normally grant petitions for certiorari solely to review what purports to be an application of state law." *Leavitt* v. *Jane L.*, 518 U.S. 137, 144 (1996).

In any event, as petitioners have again conceded, the court of appeals properly articulated the general test for scope of employment under Texas law. See Pet. App. 4a (noting that petitioners conceded that "the district court correctly articulated the general test for scope of employment in Texas"); see also Pet. App. 3a & n.3 (citing *Ross* v. *Marshall*, 426 F.3d 745, 763-764 (5th Cir. 2005) (re-articulating the three-part test established by Texas state courts), cert. denied, 127 S. Ct. 1125 (2007)). The court of appeals also properly recognized that, under Texas law, Miller's actions fell outside the scope of employment because no "legitimate employment interest animated Miller's sexual assault." Pet. App. 4a; see *Mackey* v. *U.P. Enters.*, 935 S.W.2d 446, 453 (Tex. App. 1996) ("[W]hen the servant turns aside, for however a short time, from the prosecution of the master's work to engage in an affair wholly his own [there, assault], he ceases to act for the master, and the responsibility for that which he does in pursuing his own business or pleasure is upon him alone.") (citations omitted). Similarly, the court of appeals properly rejected petitioners' arguments based on foreseeability and apparent authority because "[n]one of the [state court] cases relied upon [by petitioners] are sufficiently analogous nor do they serve

to excuse a plaintiff in this context from making a showing that an employee's wrongful act grew out of a legitimate employment duty or goal." Pet. App. 4a. Because the courts below applied settled principles of state law to the particular facts of this case, that fact-bound assessment provides no basis for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

THOMAS M. BONDY
CHRISTOPHER J. WALKER
Attorneys

JANUARY 2008

FILED
JAN 30 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

83

(4)

No. 07-501

IN THE

Supreme Court of the United States

MARILYN SHIRLEY AND RAYMOND DOUGLAS SHIRLEY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

PETER GOLDBERGER
50 RITTENHOUSE PLACE
ARDMORE, PA 19003
(610) 649-8200

PAMELA HARRIS*
Counsel of Record
HARVARD LAW SCHOOL
SUPREME COURT AND
APPELLATE PRACTICE
CLINIC

ARCH C. MCCOLL
MCCOLL & MCCOLLOCH
1601 ELM STREET
DALLAS, TX 75201
(214) 979-0999

WALTER DELLINGER
KATHRYN E. TARBERT**
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

** May be contacted at O'Melveny & Myers LLP*
***Admitted only in Wisconsin; supervised by principals at the firm*

Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR THE PETITIONERS 1

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Ali v. Fed. Bureau of Prisons,
No. 06-9130, 552 U.S. __ (Jan. 22, 2008) 3

Attallah v. United States,
955 F.2d 776 (1st Cir. 1992) 5

Burks v. Lasker,
441 U.S. 471 (1979) 8

Carlson v. Green,
446 U.S. 14 (1980) 4

Cooner v. United States,
276 F.2d 220 (4th Cir. 1960) 5

Duffy v. United States,
966 F.2d 307 (7th Cir. 1992) 5

Flechsig v. United States,
991 F.2d 300 (6th Cir. 1993) 5

Garcia v. United States,
62 F.3d 126 (5th Cir. 1994) 5

Indian Towing Co. v. United States,
350 U.S. 61 (1955) 7, 8

Lutz v. United States,
685 F.2d 1178 (9th Cir. 1982) 6

McSwain v. United States,
422 F.2d 1086 (3d Cir. 1970) 5

Nelson v. United States,
838 F.2d 1280 (D.C. Cir. 1988) 5

O'Toole v. United States,
284 F.2d 792 (2d. Cir. 1960) 5

Pattno v. United States,
311 F.2d 604 (10th Cir. 1962) 6

Piper v. United States,
887 F.2d 861 (8th Cir. 1989) 5

Primeaux v. United States,
181 F.3d 876 (8th Cir. 1999) 8, 9

S.J. & W. Ranch, Inc. v. Lehtinen,
913 F.2d 1538 (11th Cir. 1990) 6

United States v. Muniz,
374 U.S. 150 (1963) 1, 2

United States v. Neustadt,
366 U.S. 696 (1961) 7, 8

United States v. Williams,
504 U.S. 36 (1992) 2

Washington v. United States,
868 F.2d 332 (9th Cir. 1989) 5

Williams v. United States,
350 U.S. 857 (1955) 1

STATUTES

28 U.S.C. § 2680(h) 1

28 U.S.C. § 1346(b)(1) 4

LEGISLATIVE HISTORY

S. Rep. No. 93-588 (1974) 3

OTHER AUTHORITIES

Robert L. Stern, et al., *Supreme Court Practice* 421 (8th ed. 2002) 2

REPLY BRIEF FOR THE PETITIONERS

Congress amended the Federal Tort Claims Act ("FTCA") in 1974 to accept sovereign liability for the intentional torts of law enforcement officers. *See* 28 U.S.C. § 2680(h). As petitioners demonstrate in their opening brief, this extension of FTCA coverage is rendered largely inoperative if — as in the decision below — courts uncritically incorporate state law to define "scope of employment" under the FTCA. Pet. 16-19. But that dysfunctional result is compelled, according to some courts (and the government here), by this Court's 1955 two-sentence *per curiam* decision in *Williams v. United States*, 350 U.S. 857 ("*Williams*"). That tension has led to increasing confusion among federal courts over the proper relationship between federal and state law in construing the FTCA. And the government does not — and cannot plausibly — deny the host of practical problems that have arisen as a result of *Williams*, a decision the government opposed in 1955 and does not attempt to defend today.

1. The government instead claims review is unwarranted because petitioners did not argue below that the district court erred in applying Texas law to abrogate the federal waiver of immunity in 28 U.S.C. § 2680(h). Opp'n 6-7. The government is mistaken. In a petition for rehearing before the court of appeals, petitioners cited this Court's decision in *United States v. Muniz*, 374 U.S. 150 (1963), and argued that a federal court cannot "appl[y] [state law] to defeat th[e] federal statutory coverage" of the FTCA. Pet. for Reh'g 9-10. Petitioners then explained that the district court's application of state law to determine "scope of

employment" was "necessarily erroneous" because it ensured that "misconduct by law enforcement officers for which the United States is made liable by § 2680(h) would never be covered." *Id. at* 9-10. That is precisely the argument petitioners now raise before this Court. Pet. 16-20 (discussing, *inter alia*, *Muniz*); *see id.* at 12 (describing petition for rehearing). Contrary to the government's claims, therefore, the argument for interpreting the FTCA in a way that gives meaningful effect to its 1974 amendment was, indeed, pressed below and is properly reviewed by this Court. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (review proper if pressed or passed upon below). What is more, it is the *issue* presented, not necessarily the arguments advanced in support of a petitioner's position on that issue, that must ordinarily have been presented in the court below. *See* Robert L. Stern, et al., *Supreme Court Practice* 421 (8th ed. 2002) (discussing general practice and its exceptions). The issue of the United States' vicarious liability for Officer Miller's on-duty rape of petitioner Marilyn Shirley has always been presented in this case.[1]

---

[1] The government also alleges that petitioners "have again conceded[] [that] the court of appeals properly articulated the general test for scope of employment under Texas law," suggesting petitioners made such a concession in this Court. *See* Opp'n 13. Again, the government is wrong. The citation it provides is not to petitioners' brief, but to the court of appeals' decision in petitioners' appendix. *See* Opp'n 13 (citing Pet. App. 4a and Pet. App. 3a & n.3). In fact, petitioners have consistently argued that in light of the extraordinary authority exercised by law enforcement officers and the concomitant potential for abuse, state courts properly define officer assault as falling within the "scope of authority." Pet. 23-24 (citing *Doe*

2. The government next opposes review on the ground that the lower courts' application of state law to bar federal liability under § 2680(h) was "correct on the merits." Opp'n 6. For that proposition, the government relies primarily on this Court's decision in *Williams*. *Id.* at 7-8. But that argument begs the very question at issue here. The Court's *per curiam* opinion in *Williams* was issued roughly twenty years *before* Congress amended the FTCA in 1974 to waive the government's immunity for certain kinds of intentional torts committed by "law enforcement officers" "under color of Federal law." S. Rep. No. 93-588, at 3, 4 (1974); *see Ali v. Fed. Bureau of Prisons*, No. 06-9130, slip. op., at 1, 552 U.S. __ (Jan. 22, 2008) ("law enforcement officer" as defined in 28 U.S.C. § 2680(c) covers "all law enforcement officers," including "officers of the Federal Bureau of Prisons"). As petitioners explain in their opening brief, it is the juxtaposition of *Williams* with the subsequent 1974 amendment to 28 U.S.C. § 2680(h) that has created the problem at the heart of this case: that application of state-law "scope of employment" doctrines under *Williams* cannot be reconciled with the amended § 2680(h), designed to reach precisely those intentional torts most likely to fall outside state doctrines of "scope of employment." Pet. 16-19. Put differently, a citation to pre-1974 case law cannot answer the question whether "scope

---

v. City of Chicago, 360 F.3d 667 (7th Cir. 2004)). In any event, of course, the issue before this Court is not whether the court of appeals properly construed Texas law — either the general test for scope of employment or its application in this special setting — but whether the court below erred when it construed the *FTCA* to incorporate a state-law rule of *respondeat superior* that would effectively abrogate § 2680(h). Pet. 16-20.

of employment" must be defined by reference to a federal standard, rather than varying state laws, in order to give meaningful effect to Congress' 1974 amendment.[2]

The government also argues that the "plain text" of 28 U.S.C. § 1346 compels a reading under which varying state standards govern federal liability for the intentional torts of federal law enforcement officers. Specifically, the government claims, without citation, that "this Court and every court of appeals has recognized that the most natural reading of the plain text of § 1346(b) incorporates state law to determine both whether an officer acts

---

[2] Later in its brief, the government suggests that this Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), somehow clarifies that even after the 1974 amendment to § 2680(h), state law must continue to govern the "scope of employment" inquiry under FTCA § 1346(b)(1). Opp'n 12. That is incorrect. What the Court actually held in *Carlson* was that a *Bivens* action could go forward, in part because any FTCA claim for the same conduct would be available under § 1346(b)(1) "only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward." 466 U.S. at 23. But it is plain from § 1346(b)(1)'s reference to "the law of the place where [the act] occurred" — and was plain well before *Carlson* — that state law governs the type of torts for which a plaintiff may sue under the FTCA. *See* Pet. 13-15. The only question here — to which *Carlson* does not speak at all — is whether that same reference to "the law of the place where [the act] occurred" *also* governs determination of "scope of employment" under § 1346(b)(1). *See id.* If anything, the Court's failure in *Carlson* to specify that state law would govern "scope of employment" as well as the availability of a cause of action suggests that the Court regarded the determination of "scope" to be subject to federal law, or at least believed the question to be an open one.

'within the scope of his employment' and whether he 'would be liable to the claimant.'" Opp'n 11. As petitioners demonstrate in their opening brief, however, Pet. 13-14 & n.5, the "most natural" reading of the text is exactly to the contrary: § 1346's reference to state law modifies whether an officer "would be liable to the claimant," but *not* "scope of employment." And neither this Court nor the courts of appeals have actually parsed the language of § 1346 in the way the government posits. Neither of the two sentences in the *Williams per curiam* concerns itself with the text of § 1346, and the lower court cases cited by the government simply rely on *Williams* as having decided the matter and do not engage in any statutory interpretation of their own.[3]

---

[3] *See* Opp'n 9; *Garcia v. United States*, 62 F.3d 126 (5th Cir. 1994) (per curiam) (citing *Williams*, 350 U.S. 857, with no reasoning or interpretation of statute itself); *Nelson v. United States*, 838 F.2d 1280, 1282 (D.C. Cir. 1988) (same); *Attallah v. United States*, 955 F.2d 776, 781 (1st Cir. 1992) (relying on a case citing *Williams* and not interpreting statute itself); *O'Toole v. United States*, 284 F.2d 792, 795 (2d. Cir. 1960) (describing *Williams* as resolving the issue and not interpreting the statute itself); *McSwain v. United States*, 422 F.2d 1086, 1088 (3d Cir. 1970) (citing *Williams* and not interpreting statute itself); *Cooner v. United States* 276 F.2d 220, 224 (4th Cir. 1960) (citing *Williams* as requiring the application of state law, noting that this has made the "pattern . . . reveal[ed] [by FTCA decisions] . . . somewhat confused," and not interpreting statute itself); *Flechsig v. United States*, 991 F.2d 300, 302 (6th Cir. 1993) (citing *Williams* and a case that cites *Williams*, with no interpretation of statute itself); *Duffy v. United States*, 966 F.2d 307, 314 (7th Cir. 1992) (citing *Williams* and not interpreting the statute itself); *Piper v. United States*, 887 F.2d 861, 863 (8th Cir. 1989) (same); *Washington v. United States*, 868 F.2d 332, 334 (9th Cir. 1989) (citing case that cites

Though the government stretches to find that the courts have fully settled on the incorporation of state law to define "scope of employment" under the FTCA, it notably fails to defend the reasoning or the results of the decisions on which it relies. The government certainly does not explain why it has changed its own position on the matter. In *Williams*, the government argued to this Court that the FTCA "adopts the local law for the purpose of defining tort liability, not for the purpose of determining the relationship of the government to its employees," Br. for the United States, No. 24, Oct. Term 1955, at 36 (quoting *United States v. Sharpe*, 189 F. 2d 239, 241 (4th Cir. 1951)), and, moreover, that it "would hardly be . . . rational" to adopt any other rule, *id.* The government makes no effort to explain why it has now become "rational" to "subject the employment relationship between the Government and its employees to the force of . . . dissimilar and frequently irreconcilable [state] statutes and decisions." *Id.* (citing *Feres v. United States*, 340 U.S. 135, 143 (1950)).[4]

Nor does the government address the very substantial difficulties facing courts that must determine the contours of state "scope of

---

Williams, *see Lutz v. United States*, 685 F.2d 1178, 1182 (9th Cir. 1982), and not interpreting statute itself); *Pattno v. United States*, 311 F.2d 604, 607 (10th Cir. 1962) (citing *Williams* and not interpreting statute itself); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1542 (11th Cir. 1990) (same), amended on other grounds by 924 F.2d 1555 (11th Cir. 1991).

[4] Indeed, cases decided since *Williams* only lend force to the government's original contention that federal employment laws should implement uniform national standards of *respondeat superior*. *See* Pet. 26 n.8.

employment" doctrine in this context. Especially in the several states that have excluded the intentional torts of law enforcement officers from their own waivers of sovereign immunity, there is no "workable" body of state law to which courts may turn to determine scope of employment. Rather, these courts are left to apply state doctrines of *respondeat superior* developed in very different contexts to the unique problems presented when correctional officers abuse their virtually unchecked authority over their charges. Pet. 20-22. The government neither denies that this is a serious problem nor proposes any solution.

Most fundamentally, the government does not (and could not) deny that uncritical application of state law to the "scope of employment" inquiry under § 1346(b)(1) will regularly read out of the FTCA the very torts for which the 1974 Congress was most concerned with assuming liability.[5] Such a result is irreconcilable with this Court's decisions in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), and *Muniz*, 374 U.S. 150, which make clear that the FTCA must be construed so that the vagaries of state law do not stand as an obstacle to accomplishment of its goals. *See* Pet. 18. The government attempts to minimize those decisions by reading them to address only the incorporation of "state *immunity* laws for government actors." Opp'n

---

[5] *See* Pet. 17 (describing torts for which government could not be held liable under state law); *see also United States v. Neustadt*, 366 U.S. 696, 707 (1961) ("Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act" governing liability for those harms).

9 n.2 (emphasis added). But this Court has not been so stingy with its precedent[6]—and with good reason. The recognition that the FTCA is not "self-defeating," *Indian Towing*, 350 U.S. at 65, is but a straightforward application of the basic tenet, long applied by this Court, that, even where a federal statute incorporates state law for a rule of decision, the state law applies only to the extent that it is consistent with the federal policy underlying the cause of action and does not cause "the prohibition of [the] federal statute . . . [to] be set at naught." *Burks v. Lasker*, 441 U.S. 471, 480 n.6 (1979) (internal quotation marks omitted); *see* Pet. 19.

3. In addition to making its merits arguments — which, of course, are more appropriately explored if and when this Court grants review — the government insists that there is no division of lower court authority and thus no justification for certiorari review. Opp'n 8-9. Again, the government is wrong.

First, a number of lower courts have indeed expressed confusion over the impact of the 1974 amendment on the use of state law to define "scope of employment." *See* Pet. 15-19. The government misses the mark when it characterizes the debate in *Primeaux v. United States*, 181 F.3d 876 (8th Cir. 1999) (en banc, 6-5), for example, as a purely state-law quarrel. *See* Opp'n 8. In fact, the very heart of the dispute between the majority and the dissent in

---

[6] *See Neustadt*, 366 U.S. at 708 (construing the word "misrepresentation" in Section 2680(h) and quoting *Indian Towing* for the proposition that "[t]here is nothing in the Tort Claims Act which shows that Congress intended to draw . . . finespun and capricious [distinctions]" in liability).

that case was whether, in light of "Congress['] inten[t] . . . to include [law enforcement officers'] intentional torts within the liability of the government," *Primeaux,* 181 F.3d at 885 (Lay, J., dissenting), the court could properly cabin the government's liability to a limited "scope of employment" under state law, or whether the 1974 amendment required application of a broader doctrine of *respondeat superior* under which the government would have been liable for the sexual assault committed by the defendant officer. *See id.* at 878 (majority opinion); *id.* at 882 & nn.1, 2, 885 (Lay, J., dissenting).

Second, to the extent that lower courts have not more successfully addressed the problems caused by the incorporation of state-law standards into the FTCA's "scope of employment" requirement, and the conflict over the interpretation of § 1346(b)(1) and the 1974 amendment is not greater, it is, as the government suggests, because this Court's decision in *Williams* has stood as an obstacle to meaningful development of the law in that area. This is the rare case in which the absence of a deeper conflict only confirms the necessity for this Court's prompt review: Without guidance from this Court on how — if at all — *Williams* can be reconciled with the subsequent 1974 amendment of the FTCA, the lower courts are left with no room to develop their own solutions to the problem. Though the Court need not overrule *Williams* in order to find for petitioners here, *see* Pet. 17 n.6, this case does present the Court with an excellent vehicle for revisiting *Williams* in light of the 1974 amendment, in order to ensure that the FTCA is construed in a manner that effectuates

rather than frustrates Congress's undisputed intent when it waived the United States' immunity for the intentional torts of its law enforcement officers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER GOLDBERGER
50 RITTENHOUSE PLACE
ARDMORE, PA 19003
(610) 649-8200

ARCH C. MCCOLL
MCCOLL & MCCOLLOCH
1601 ELM STREET
DALLAS, TX 75201
(214) 979-0999

PAMELA HARRIS*
Counsel of Record
HARVARD LAW SCHOOL
SUPREME COURT AND
APPELLATE PRACTICE
CLINIC

WALTER DELLINGER
KATHRYN E. TARBERT**
O'MELVENY & MYERS
LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

** May be contacted at O'Melveny & Myers LLP*
***Admitted only in Wisconsin; supervised by principals at the firm*

Attorneys for Petitioners

January 30, 2008

FILED
NOV 9 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-501

IN THE
Supreme Court of the United States

MARILYN SHIRLEY AND RAYMOND DOUGLAS SHIRLEY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF STOP PRISONER RAPE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MELISSA ROTHSTEIN*
STOP PRISONER RAPE
3325 Wilshire Blvd.,
Suite 340
Los Angeles, CA 90010
(213) 384-1400

* Counsel of record

November 9, 2007

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. This Court Should Consider Whether the Federal Tort Claims Act Requires a Uniform Federal Standard for "Scope of Employment" That Takes Account of the Unique Authority Granted to Law Enforcement Officers, Including Corrections Officials 4

II. The Court Should Evaluate the Applicability of the Law Enforcement Exception in 28 U.S.C. § 2680(h) to BOP Officials who Rape Federal Inmates 7

III. This Court Should Consider Whether Applying Inconsistent State Law Standards to Determine Scope of Employment Conflicts with Federal Law Addressing Custodial Sexual Abuse 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). 8

Sandoval v. United States, 980 F.2d 1057 (5th Cir. 1993). 10

STATUTES

18 U.S.C. § 2243. ..... 6, 11

28 U.S.C. § 2680. ..... 2, 7

42 U.S.C. § 15601 *et seq.* 1, 3, 10

42 U.S.C. § 15602. ..... 10, 12

OTHER AUTHORITIES

Allen J. Beck, Paige M. Harrison & Devon B. Adams, Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2006* at 14 (2007). 5, 11

Allen J. Beck & Paige M. Harrison, Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2005* at 14 (2006). 5

Allen J. Beck & Timothy A. Hughes, Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2004* (2005). 5-6

TABLE OF AUTHORITIES
(continued)

Amnesty International, *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women* (2001). 5

Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret,* 18 Yale L. & Pol. Rev. 195 (1999). 5

Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prison,* 39 J. Sex Res. 217 (2002). 5

Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men,* 80 Prison J. 379 (2000). 5

Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison,* 33 J. Sex Res. 67 (1996). 5

Federal Bureau of Prisons, Program Statement 5324.06, *Sexually Abusive Behavior Prevention and Intervention Program* (2005), *available on-line at* http://www.bop.gov/policy/progstat/5324_006.pdf (last visited Nov. 6, 2007). 6-7

TABLE OF AUTHORITIES
(continued)

Nat'l Inst. Of Corrections, Dept. of Justice, *Addressing Staff Sexual Misconduct with Offenders, Remote Conference for Investigating and Preventing Staff Sexual Misconduct in a Corrections Setting* (2001), *cited in* Office of the Inspector General, Dept. of Justice, *Deterring Staff Sexual Abuse of Federal Inmates* (2005). 6

S. Rep. 93-588 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2789. 7-10

Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 – The Prison Rape Elimination Act of 2003,* 32 J. Legis. 142 (2006). 9

INTEREST OF *AMICUS CURIAE*[1]

Stop Prisoner Rape (SPR) is the only organization in the United States exclusively dedicated to putting an end to sexual violence against men, women, and youth in all forms of detention. To achieve this goal, SPR seeks to: engender policies that ensure government accountability for prisoner rape; change ill-informed and flippant public attitudes toward sexual assault behind bars; and promote access to resources for survivors of this type of violence.

The work of SPR was critical in securing the passage of the Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 *et seq.*, and SPR has since led the call to ensure the law's full implementation. The organization's professional staff of lawyers, social workers, and journalists regularly provide expertise to lawmakers, corrections officials, counselors, advocates, and reporters. Given its unique expertise and experience, SPR believes its perspective would be helpful to this Court in determining whether to grant a writ of certiorari in this case.

---

[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party to this dispute authored this motion or this brief in whole or in part and no person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of this motion or this brief.

In accordance with Rule 37.2(a), *Amicus Curiae* notified the parties of its intent to file a brief on October 29, 2007. Counsel for both parties consented to this filing in separate facsimiles dated October 30, 2007.

SUMMARY OF ARGUMENT

SPR urges the Court to grant *certiorari* in this case to assess whether the scope of employment for a federal law enforcement official should be determined by federal law, such that the exception to sovereign immunity in the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(h), applies consistently throughout the country.

Law enforcement officers in general, and corrections officials in particular, are vested with unique and extraordinary authority as part of their employment. Federal inmates cannot leave the watch of Bureau of Prison officials and must comply with all of the officers' orders to avoid disciplinary action. By abusing their authority, the worst officials have been able to rape or otherwise sexually assault inmates in their charge.

The need for the law enforcement exception in § 2680(h) when officials abuse their authority to commit custodial sexual abuse is on all fours with the reasoning Congress provided for the exception. Like the victims of the no-knock raids that inspired the amendment, federal inmates who are raped by Bureau of Prison officials have no effective remedy other than an FTCA action for the intentional abuses inflicted upon them. Individual officers (like the one whose actions underlie this petition) are generally judgment proof and, as an officer's actions are not tied to criminal proceedings against the prisoner, a prisoner rape survivor has no other legal

remedy, such as the exclusion of evidence. The lack of redress is particularly troubling in light of the serious long-term consequences of prisoner rape, including post-traumatic stress disorder, depression, exacerbation of pre-existing psychiatric conditions, suicidal ideation, pregnancy, and HIV.

Finally the inconsistent analysis resulting from a state law standard for scope of employment conflicts with the spirit of federal law, namely the Prison Rape Elimination Act (PREA) of 2003, 42 U.S.C. § 15601 *et seq*. PREA requires corrections facilities to develop a zero-tolerance approach to sexual violence and seeks to increase accountability of officials and protect the constitutional rights of inmates. Without a standard ensuring that the Government can be held liable for the intentional sexual abuse committed by on-duty BOP officers, prisoner rape survivors have no incentive to report abuse and the goals of PREA will be thwarted.

ARGUMENT

I. This Court Should Consider Whether the Federal Tort Claims Act Requires a Uniform Federal Standard for "Scope of Employment" That Takes Account of the Unique Authority Granted to Law Enforcement Officers, Including Corrections Officials.

Because of their employment with the United States, Bureau of Prison (BOP) officials have complete control over a federal prisoner's day-to-day life. Inmates cannot leave the area that the officer is guarding, must submit to searches by the officer, are watched by officers even in states of undress, and are required to follow officers' orders.

The authority vested in BOP officials enables the worst of these officers to rape inmates who they are charged with protecting. Refusing the order of a corrections official can result in a disciplinary infraction, solitary confinement, restrictions on family contact, removal from programs, and/or a loss of "good time." Thus, while in the typical tort, both parties have the means to leave the location and refuse the other person's demands, inmates receiving orders from corrections officials cannot do so.

Reliable estimates of the incidence of sexual violence in detention are difficult to obtain, due in part to the challenges of collecting data in a climate of fear of retaliation and stigma. Research suggests that as many as 20 percent of male prisoners have been pressured or coerced into sex, and ten percent

have been raped.[2] *See* Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. Sex Res. 67 (1996); *see also* Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 Prison J. 379, 383 (2000). In one women's facility, more than a quarter of the women studied said they had been pressured into sex. *See* Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prison*, 39 J. Sex Res. 217, 220 (2002). Women inmates are most vulnerable to sexual assault perpetrated by male officers. *See* Amnesty International, *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women* 17 (2001); Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 Yale L. & Pol. Rev. 195, 202-03 (1999).

While fear of future attacks causes many prisoner rape survivors to remain silent about their abuse, each year, the BOP receives more than 200 complaints alleging staff sexual misconduct in federal prisons. *See* Allen J. Beck, Paige M. Harrison & Devon B. Adams, Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2006* at 14 (2007); Allen J. Beck & Paige M. Harrison, Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2005* at 14 (2006); Allen J. Beck & Timothy A. Hughes, Bureau

---

[2] These statistics include both staff-on-inmate and inmate-on-inmate sexual violence.

of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2004* at 14 (2005). As the statisticians acknowledged, "due to the fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and lack of trust in staff victims are often reluctant to report incidents to correctional authorities," Beck & Hughes, *supra*, at 2, and the actual incidence rate is likely much higher. According to Kathleen Hawk Sawyer, former Director of the BOP, sexual abuse of inmates was the biggest problem she faced as Director. *See* Nat'l Inst. Of Corrections, Dept. of Justice, *Addressing Staff Sexual Misconduct with Offenders, Remote Conference for Investigating and Preventing Staff Sexual Misconduct in a Corrections Setting* (2001), *cited in* Office of the Inspector General, Dept. of Justice, *Deterring Staff Sexual Abuse of Federal Inmates* 4 (2005).

The BOP has recognized custodial sexual abuse as an employment matter for federal law enforcement officers. It has developed a program statement pertaining to sexual violence prevention and mandates sexual violence awareness training. *See* Federal Bureau of Prisons, Program Statement 5324.06, *Sexually Abusive Behavior Prevention and Intervention Program* (2005), *available on-line at* http://www.bop.gov/policy/progstat/5324_006.pdf (last visited Nov. 6, 2007). While not focused exclusively on staff-on-inmate sexual assaults, the policy (in accordance with federal criminal law, *see* 18 U.S.C. § 2243) states that "except in cases where staff are clearly the victim of inmate sexually abusive behavior, sexual behavior between staff and in-

mates is **always** the staff member's responsibility." *Id.* at ¶ 7(b) (emphasis in original).

In part because of the fear of reporting, few prisoner rape survivors file tort actions in court. As a result, many states, including Texas, do not have case law directly addressing sexual abuse by corrections officials. As laid out in the Petition, among the states that have considered the scope of employment for law enforcement officials, the courts' analyses and conclusions have been divided. *See* Pet. at 22-27.

While not authorized or condoned by the United States, prisoner rape and other forms of custodial sexual misconduct against inmates in federal prisons arises from the authority that the United States grants to corrections officials in their employment with the Bureau of Prisons. Some corrections officials have relied on their responsibility for establishing and maintaining physical and psychological control over inmates to abuse their authority and rape inmates in their charge.

II. The Court Should Evaluate the Applicability of the Law Enforcement Exception in 28 U.S.C. § 2680(h) to BOP Officials who Rape Federal Inmates.

As discussed in the Petition, the Federal Tort Claims Act explicitly recognizes the increased government liability when an assault is committed by a law enforcement officer. *See* 28 U.S.C. § 2680(h); *see also* Pet. at 5-6. Congress passed § 2680(h) in response to "abusive, illegal and unconstitutional 'no-knock' raids" by Federal narcotics agents. S. Rep. 93-588 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2789,

2790. In the most notorious of these raids, Justice Department agents, without warrants, kicked in the doors of two houses, shouted obscenities, and threatened the occupants with drawn weapons, leaving only once they realized they had entered the wrong homes. *Id.*

Recognizing that the victims in these cases lacked any legal remedy against the Government, and that individual agents were generally judgment proof, Congress sought to "deprive the Federal Government of the defense of sovereign immunity in cases in which federal law enforcement agents, acting within the scope of their employment, or under color of federal law, commit ... assault [and other enumerated torts]." S. Rep. 93-588, *supra.*

Like the agents who conducted the illegal no-knock raids inspiring the 1974 amendment, the Bureau of Prisons official who raped Petitioner relied on the authority that the United States bestowed upon him in his employment as a federal corrections officer. Specifically, he was able to use his responsibility for establishing and maintaining physical and psychological control over inmates to bring Petitioner to an isolated location and force her to engage in sex acts. Identical to the concerns raised by Congress in § 2680(h), the officer was found liable under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), but, because he is judgment proof, Petitioner has not been able to obtain any relief.

Corrections officials present a striking example of the authority that law enforcement agents may have over citizens. A police officer's power to use force to

detain or search an individual is constitutionally sharply limited by the Fourth Amendment, while a corrections official's job is to maintain control over the prisoners in his charge and is subject to only very lenient Eighth Amendment limitations.

Inmates who are raped by BOP officials have "no effective legal remedy against the Federal Government for the actual physical damage, mu[ch] less the pain, suffering and humiliation to which [they] have been subjected." S. Rep. 93-588, *supra*. The physical and emotional damages that prisoner rape survivors endure are typically even more severe than those experienced by the victims of the illegal no-knock raids. Survivors of sexual violence in detention often develop long-term psychological problems, such as post-traumatic stress disorder, depression, exacerbation of pre-existing psychiatric conditions, and suicidal ideation. *See* Robert W. Dumond, *The Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 – The Prison Rape Elimination Act of 2003*, 32 J. Legis. 142, 151 (2006). They are also placed at serious risk for becoming pregnant and contracting sexually transmitted diseases, including HIV.

In enacting § 2680(h) Congress noted the injustice that, "under the Federal Torts Claims Act, a Federal mail truck driver creates direct federal liability if he negligently runs down a citizen on the street but the Federal Government is held harmless if a federal narcotics agent intentionally assaults that same citizen in the course of an illegal 'no-knock' raid." S. Rep. 93-588, *supra*. The disparity is

equally apparent here. Under the Fifth Circuit's reasoning, the United States government may be liable when an officer negligently houses an inmate unsafely, *see, e.g., Sandoval v. United States*, 980 F.2d 1057 (5th Cir. 1993), but not when the officer sexually assaults the same inmate.

III. This Court Should Consider Whether Applying Inconsistent State Law Standards to Determine Scope of Employment Conflicts with Federal Law Addressing Custodial Sexual Abuse.

As detailed in the Petition, the reliance on state law to determine whether intentional misconduct is within the scope of employment has resulted in United States liability for the sexual abuse committed by federal law enforcement officials being based, in part, on the jurisdiction in which the abuse occurred. *See* Pet. at 22-26. The application of inconsistent state law standards on scope of employment conflict with the intent of the Prison Rape Elimination Act (PREA), 42 U.S.C. § 15601 *et seq*.

PREA was unanimously passed by a bipartisan Congress in 2003 and requires that detention facilities adopt a zero-tolerance approach to sexual assault in detention. 42 U.S.C. § 15602(1). Among its stated purposes, PREA seeks to "increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape" and "protect the Eighth Amendment rights of Federal ... prisoners." 42 U.S.C. § 15602 (6),(7).

As discussed above, *see supra* Section I, prisoner rape survivors are often fearful of reporting custodial

sexual abuse because of the likelihood of retaliation, further abuse, segregation, and other punitive conditions. Without a federal standard for Government liability for this abuse, prisoner rape survivors in federal facilities have no incentive to report abuse.

In the rare instances where injunctive relief is available, these remedies may ultimately help prevent further abuse, but do not compensate for the harm already done. Penalties against the perpetrator are also rare. In cases of substantiated custodial sexual misconduct in federal and state prisons, the offending official was referred for prosecution only 39 percent of the time,[3] and only 33 percent were formally discharged from employment.[4] *See* Beck, Harrison, & Adams, *supra,* at 9, table 2.

Aware of the risks that come with reporting, and with no clear indication that, even once their case gets to court, there will be any relief, federal inmates who have been sexually assaulted are implicitly encouraged to remain silent about the abuse. As discussed in Section II, *supra,* Bivens actions against individual officials are generally hollow victories that neither provide financial relief nor create an incentive for facilities to be more diligent in their hiring and supervising of officials.

---

[3] The federal custodial sexual misconduct law, 18 U.S.C. § 2243, makes it a crime for an officer to have sexual contact with an inmate, regardless of consent.

[4] Thirty-seven percent of staff resigned prior to investigation and another ten percent resigned after investigation. *See* Beck, Harrison, & Adams, *supra,* at 9, table 2.

More important, without a consistent standard recognizing that sexual abuse committed by on-duty BOP staff is within the scope of employment – such that the United States may be held liable – prisoners are implicitly told that the BOP may escape responsibility for one of the most egregious abuses that occurs in its facilities. This inconsistency greatly undermines PREA's stated goals of encouraging corrections authorities to prioritize the prevention of prisoner rape, increase accountability, and protect inmates' constitutional right to be free from sexual abuse. *See* 42 U.S.C. § 15602 (2), (6), (7).

CONCLUSION

For the reasons stated above and in the Petition, this Court should accept this case for review.

Respectfully submitted,

MELISSA ROTHSTEIN*
STOP PRISONER RAPE
3325 Wilshire Blvd.,
Suite 340
Los Angeles, CA 90010
(213) 384-1400

* Counsel of record

November 9, 2007